90-913 (1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA, PETITIONER

v.

MCORP FINANCIAL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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112

QUESTIONS PRESENTED

1. Whether despite the express limitation of 12 U.S.C. 1818(i)(1), the district court may invoke *Leedom* v. *Kyne*, 358 U.S. 184 (1958), to exercise jurisdiction over a bank holding company's claim that the Federal Reserve Board lacked statutory authority to file administrative charges enforcing its "source of strength" regulations.

2. Whether the Federal Reserve Board has statutory authority to promulgate and enforce its "source of strength" regulations, which make bank holding companies responsible for maintaining adequate capitalization of subsidiary banks.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, MCorp and MCorp Management were plaintiffs in the district court and appellees in the court of appeals. The Official Creditors' Committee of MCorp, MCorp Financial, Inc., and MCorp Management was an intervenor in the district court and an appellee in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2, 49a
Statement	2
A. The statutory and regulatory scheme	2
B. The proceedings in this case	7
C. The court of appeals decision	11
Reasons for granting the petition	14
Conclusion	29
Appendix A	1a
Appendix B	27a
Appendix C	29a
Appendix D	49a

TABLE OF AUTHORITIES

Cases:

Board of Governors v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978) ... 3, 6, 12, 25, 26

Boire v. *Greyhound Corp.*, 376 U.S. 473 (1964) ... 19, 21

Brotherhood of Ry. & S.S. Clerks v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) ... 19, 21

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ... 12, 21, 22

Citizens Bancorporation, 61 Fed. Res. Bull. 806 (1975) ... 6

Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) ... 21

Compensation Dep't v. *Marshall*, 667 F.2d 336 (3d Cir. 1981) ... 20

Cases – Continued: Page

Federal Trade Comm'n v. *Standard Oil Co.*, 449 U.S. 232 (1980) 22
Greater Detroit Resource Recovery Auth. & Combustion Eng'g v. *EPA*, No. 88-2269 (6th Cir. Aug. 30, 1990) 20
Gulf Federal Savings & Loan Ass'n v. *Federal Home Loan Bank Bd.*, 651 F.2d 259 (5th Cir. 1981), cert. denied, 458 U.S. 1121 (1982) 13
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Leedom v. *Kyne*, 358 U.S. 184 (1958) 11, 14-15, 18, 19, 20, 21, 22
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Mid-Continent Bancorporation, 52 Fed. Res. Bull. 198 (1966) 6
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Toilet Goods Ass'n v. *Gardner*, 387 U.S. 158 (1967) 28
United States v. *American Ry. Express Co.*, 265 U.S. 425 (1924) 18
United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) 28
Whitney Nat'l Bank v. *Nat'l Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) 20

Statutes and regulations: Page

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Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 5
Bank Holding Company Act of 1956, 12 U.S.C. 1841 *et seq.*: 2
- 12 U.S.C. 1841(a)(1) 2
- 12 U.S.C. 1842(a) 2, 49a
- 12 U.S.C. 1842(c) (§ 3(c)) 2-3, 12, 26, 27, 50a
- 12 U.S.C. 1843 ..... 3, 28
- 12 U.S.C. 1844 2
- 12 U.S.C. 1844(b) 3, 27, 52a
- 12 U.S.C. 1844(c) 3, 28, 52a
- 12 U.S.C. 1844(e) 3, 28, 53a

Federal Reserve Act, 12 U.S.C. 371c 9
Financial Institutions Supervisory Act of 1966, 12 U.S.C. 1818:
- 12 U.S.C. 1818 ..... 2, 5, 55a
- 12 U.S.C. 1818(b) 7, 24, 28, 58a
- 12 U.S.C. 1818(b)(1) 4, 11, 23, 28, 58a
- 12 U.S.C. 1818(b)(3) 4, 23, 59a
- 12 U.S.C. 1818(c)(1) 4, 5, 8, 60a
- 12 U.S.C. 1818(c)(2) 5, 61a
- 12 U.S.C. 1818(d) 5, 62a
- 12 U.S.C. 1818(h) 4, 62a
- 12 U.S.C. 1818(h)(1) 5, 62a
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- 12 U.S.C. 1818(i)(1) 5, 10, 15, 18, 20, 21, 64a
- 12 U.S.C. 1823(c) 9

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- Tit. II, 103 Stat. 187:
  - § 206(e), 12 U.S.C. 1818(e) 17

Statutes and regulations – Continued: Page

Tit. IX, 103 Stat. 446:
§ 902, 12 U.S.C. 1818 2
§ 902, 12 U.S.C. 1818(b)(6) 4, 67a
International Lending Supervision Act of 1983, 12 U.S.C. 3901 *et seq.* 2
§ 908, 12 U.S.C. 3907 .... 2, 3, 28, 70a
§ 908(a), 12 U.S.C. 3907(a) 3, 25, 70a
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§ 908(b)(2), 12 U.S.C. 3907(b)(2) 16, 71a
§ 910, 12 U.S.C. 3909 .... 2, 3, 72a
§ 910(a)(2), 12 U.S.C. 3909(a)(2) 3, 28, 72a-73a
11 U.S.C. 105 11
28 U.S.C. 158(d) 10
28 U.S.C. 1334 22
28 U.S.C. 1334(d) 10
12 C.F.R.:
Pt. 3:
Sections 3.15-3.21 16
Pt. 225 2
Section 225.4(a)(1) 6, 74a
Sections 225.21-225.31 3
Pt. 263:
Sections 263.1 *et seq.* 4
Sections 263.35-263.40 .... 3, 28

Miscellaneous:

1985 Annual Report on Formal Enforcement Actions 15
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Miscellaneous – Continued: Page

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p. 818 6
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S. Rep. No. 19, 100th Cong., 1st Sess. (1987) 26

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Board of Governors of the Federal Reserve System of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-26a) is reported at 900 F.2d 852. The opinion of the district court (App., *infra,* 29a-48a) is reported at 101 Bankr. 483.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1990. A petition for rehearing was denied on August 6, 1990. App., *infra,* 27a-28a. On October 22, 1990, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including December 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent sections of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(a), 1842(c), 1844) are reprinted at App., *infra,* 49a-55a. Pertinent sections of the Financial Institutions Supervisory Act of 1966 (12 U.S.C. 1818), as amended by Section 902 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, are reprinted at App., *infra,* 55a-70a. Sections 908 and 910 of the International Lending Supervision Act of 1983 (12 U.S.C. 3907, 3909) are reprinted at App., *infra,* 70a-72a. Pertinent sections of Federal Reserve Board regulations, 12 C.F.R. Part 225, are reprinted at App., *infra,* 72a-75a.

STATEMENT

A. The Statutory and Regulatory Scheme

1. Congress has vested the Board of Governors of the Federal Reserve System with substantial supervisory authority over the formation, structure, and operation of bank holding companies, *i.e.*, any company that has direct or indirect control of any bank. 12 U.S.C. 1841(a)(1). The Board exercises such authority under three related statutory schemes, the Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. 1841 *et seq.*, the International Lending Supervision Act of 1983 (ILSA), 12 U.S.C. 3901 *et seq.*, and the Financial Institutions Supervisory Act (FISA), 12 U.S.C. 1818, as amended by Section 902 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, Tit. IX, 103 Stat. 450-451.

Under the BHCA, a company may not acquire a bank without first obtaining the Board's approval. 12 U.S.C. 1842(a). In reviewing a company's application to buy a bank, the Board must consider, among other factors, "the financial and managerial resources and future prospects of the company or companies and the banks concerned." 12 U.S.C. 1842(c); see *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978). The BHCA generally requires the company to limit its operations to banking activities and to other "nonbanking" activities that are closely related or incident to banking. 12 U.S.C. 1843; see also 12 C.F.R. 225.21-225.31.[1] Under its supervisory power, the Board "from time to time may require reports [from] * * * and * * * may make examinations of each bank holding company and each subsidiary thereof." 12 U.S.C. 1844(c). The Board has authority to curtail a bank holding company's "nonbank" activities that pose risks to a bank's financial stability or are "inconsistent with sound banking principles or with the purposes of [the BHCA]." 12 U.S.C. 1844(e); see, *e.g.*, *Independent Ins. Agents* v. *Board of Governors,* 890 F.2d 1275 (2d Cir. 1989), cert. denied, 111 S. Ct. 44 (1990).

Under Sections 908 and 910 of ILSA, 12 U.S.C. 3907 and 3909, the Board regulates and enforces the capital adequacy of each holding company. Section 908 empowers the Board to establish minimum capital levels, 12 U.S.C. 3907(a), and provides that the failure of a holding company's insured bank to maintain these capital levels "may be deemed by the [Board], in its discretion, to constitute an unsafe and unsound practice within the meaning of [12 U.S.C. 1818]," 12 U.S.C. 3907(b)(1); see 12 U.S.C. 3909(a)(2). Moreover, ILSA provides that the Board may order holding companies to achieve required levels of capital where necessary to remedy unsafe or unsound banking practices. 12 U.S.C. 3909(a)(2); see 12 C.F.R. 263.35-263.40.

Under FISA, the Board has authority to begin "cease-and-desist" proceedings against a bank holding company if, in the Board's view, the company "is engaging or has engaged" or the Board "has reasonable cause to believe that

[1] The BHCA empowers the Board to "issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of the [the Act] and prevent evasions thereof." 12 U.S.C. 1844(b).

[the company] is about to engage, in an unsafe or unsound practice in conducting the business of such [company]." 12 U.S.C. 1818(b)(1); see 12 U.S.C. 1818(b)(3) (Board's authority under Section 1818(b) applies to "any bank holding company, and to any subsidiary (other than a bank) of a bank holding company"). After an administrative hearing,[2] the Board may direct the holding company to "take affirmative action to correct the conditions resulting from any such violation or practice." 12 U.S.C. 1818(b)(1). As amended by Section 902 of FIRREA, FISA further provides that the Board's remedial powers include the authority to order the offending holding company to make restitution to subsidiaries, to dispose of a loan or asset, or to "take such other action as [the Board] determines to be appropriate." 103 Stat. 450-451 (to be codified at 12 U.S.C. 1818(b)(6)).

In addition, under FISA, the Board has authority to issue a temporary cease-and-desist order—without first holding a hearing—if it finds that the unsafe or unsound practice "is likely to cause insolvency or substantial dissipation of assets or earnings of the bank, or is likely to seriously weaken the condition of the bank or otherwise seriously prejudice the interests of its depositors" before completion of administrative proceedings under Section 1818(b)(1). 12 U.S.C. 1818(c)(1). The Board's order under this provision may direct "affirmative action to prevent

[2] FISA and the Board's implementing regulations establish comprehensive procedures for exercising these enforcement powers. The statute requires sufficient notice to the holding company of the underlying charge, an evidentiary hearing before an independent presiding official, and a decision based on the hearing record. 12 U.S.C. 1818(b)(1), (b)(3), 1818(h). Board regulations further provide that the holding company may appear through counsel, compel the attendance of witnesses and the production of documents, adduce any relevant and material evidence, cross-examine adverse witnesses, and present its position through written submissions and oral argument. 12 C.F.R. 263.1 *et seq.*

such insolvency, dissipation, condition, or prejudice pending completion of such proceedings." 12 U.S.C. 1818(c)(1). Such an order is effective immediately upon service and is enforceable by injunction in the appropriate United States District Court. 12 U.S.C. 1818(c)(1) and (d).

FISA provides specific avenues for judicial review of matters involving the Board's enforcement actions. First, a bank holding company may petition for review of a *final* cease-and-desist order under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the appropriate United States Court of Appeals. 12 U.S.C. 1818(h)(2).[3] Second, the United States District Courts have jurisdiction to issue an injunction "setting aside, limiting, or suspending" a *temporary* cease-and-desist order pending completion of the administrative enforcement proceedings. 12 U.S.C. 1818(c)(2). Third, upon the Board's application, the district courts have jurisdiction to enforce compliance with any notice or order issued under Section 1818. 12 U.S.C. 1818(i)(1). FISA, however, expressly bars federal courts from assuming jurisdiction to review or intervene in the Board's enforcement proceedings in any other manner or circumstance, stating that

> except as otherwise provided in [12 U.S.C. 1818] no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. 1818(i)(1); see 12 U.S.C. 1818(h)(1).

2. As part of its supervision of bank holding companies' corporate practices, the Board's "source of strength"

[3] Once a petition for review is filed, FISA provides that the court of appeals' jurisdiction shall be "exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency." 12 U.S.C. 1818(h)(2). The sole exception to this exclusive jurisdiction is limited to instances where the Board, with the court's permission, modifies, terminates, or sets aside its order. See 12 U.S.C. 1818(h)(1) and (2).

regulation generally provides that "[a] bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not con[d]uct its operations in an unsafe or unsound manner." 12 C.F.R. 225.4(a)(1) (Regulation Y). The Board first articulated the policy reflected in that regulation in its case-by-case review of companies' applications to acquire banks. In reviewing these applications, the Board made clear that it would not approve bank acquisitions unless the prospective parent holding company would retain the ability to act as a source of financial and managerial assistance to its subsidiary banks, should the need for such assistance arise.[4] And in *First Lincolnwood Corp.*, 439 U.S. at 248, this Court upheld the Board's authority to disapprove the formation of a bank holding company on the basis of the grounds asserted in those administrative determinations, namely, the applicant's inability to act as a "source of strength" to subsidiary banks.

In 1984, the Board codified the source of strength policy in its published regulations governing a holding company's corporate practices. See 49 Fed. Reg. 818, 820 (1984). As part of that codification, the Board explained that its source of strength regulation

> is derived from section 3(c) of the BHC Act [12 U.S.C. 1842(c)], which requires the Board to consider the financial and managerial resources and future prospects of the company and banks concerned; from section 5(b) of the BHC Act [12 U.S.C. 1844(b)], which authorizes the Board to issue regulations; and from the Board's authority under the Financial Institutions Supervisory Act to issue cease-and-desist orders to prevent unsafe or unsound banking practices (12 U.S.C. 1818(b)(1) and (3)).

[4] See, *e.g.*, *Citizens Bancorporation*, 61 Fed. Res. Bull. 806, 806 (1975); *Midwest Bancorporation, Inc.*, 56 Fed. Res. Bull. 948, 950 (1970); *Mid-Continent Bancorporation*, 52 Fed. Res. Bull. 198, 200 (1966).

48 Fed. Reg. 23,520, 23,523 (1983) (notice of proposed rulemaking).

In 1987, the Board issued a formal statement clarifying its long-standing policy that bank holding companies should act as sources of strength to their subsidiary banks by "stand[ing] ready to use available resources to provide adequate capital funds to * * * subsidiary banks during periods of financial stress or adversity." *Policy Statement; Responsibility of Bank Holding Companies to Act as Sources of Strength to Their Subsidiary Banks*, 52 Fed. Reg. 15,707, 15,707 (1987). In support of that policy, the Board pointed out that a holding company derives financial benefits from ownership of institutions that can accept federally insured deposits, and reasoned that these commercial advantages create a correlative obligation to serve as sources of strength and support to subsidiary banks. *Ibid.* The Board also stated that bolstering a subsidiary bank's capital cushion promotes bank safety and public confidence, and reduces the federal deposit insurance fund's exposure to loss. *Ibid.* Accordingly, the Board stated that "[a] bank holding company's failure to assist a troubled or failing subsidiary bank * * * would generally be viewed as an unsafe and unsound banking practice or a violation of Regulation Y or both" that would result in an appropriate enforcement action. *Id.* at 15,707-15,708.

B. The Proceedings in This Case

1. In October 1988, the Board issued a "notice of charges" under 12 U.S.C. 1818(b) against respondent MCorp, a bank holding company headquartered in Texas, and two of its subsidiaries, respondents MCorp Financial, Inc., and MCorp Management (collectively MCorp). MCorp owned 25 subsidiary banks, many of which were in deteriorating financial condition and could not meet the Comptroller of the Currency's requirements for minimally acceptable capital reserves. The Board alleged that MCorp

> was engaging in unsafe and unsound practices, likely to cause substantial dissipation of the assets of MCorp that could be used to allow MCorp to serve as a source of financial strength for the subsidiary Banks.

App., *infra,* 2a; see *id.* at 31a.[5] Accordingly, the Board notified MCorp of the convening of an administrative hearing to determine whether the company should be ordered to cease and desist from specified unsafe and unsound practices and to undertake appropriate remedial measures. In an amended notice filed a week later, the Board sought to require MCorp to

> implement[ ] an acceptable capital plan that would ensure that all of MCorp's available assets are used to recapitalize the Subsidiary Banks that are suffering capital deficiencies.

Id. at 2a.

At the same time, the Board issued temporary cease-and-desist orders under 12 U.S.C. 1818(c)(1) that pro-

[5] In particular, the Board alleged that it had reasonable cause to believe that

> MCorp will not take the actions that are necessary (1) to prevent the substantial dissipation of corporate assets through cash dividends, and (2) to maintain and prevent the dissipation of available resources at the parent company level that could be used, where appropriate, to make immediate capital injections into the Subsidiary Banks.

Notice of Charges ¶ 7(b), *In re MCorp,* No. 88-062-B-HC (Fed. Res. Bd. Oct. 19, 1988).

In the amended notice of charges filed one week later, the Board also alleged that it had reasonable cause to believe that "MCorp will not take the actions that are necessary * * * to use all available resources to make immediate capital injections into the Subsidiary Banks." Amended Notice of Charges ¶ 8(b), *In re MCorp,* No. 88-062-B-HC (Fed. Res. Bd. Oct. 26, 1988).

hibited MCorp from dissipating its assets through dividend payments or unusual business transactions, and directed MCorp to identify those subsidiary banks that would receive capital infusions from MCorp's corporate assets and resources. See Order, *In re MCorp,* No. 88-062-C-HC (Fed. Res. Bd. Oct. 19, 1988); Amended Order, *In re MCorp,* No. 88-062-C-HC (Fed. Res. Bd. Oct. 26, 1988).

The Board postponed resolution of the "source of strength" charges pending MCorp's attempt to secure "open bank" financial assistance from the Federal Deposit Insurance Corporation. See 12 U.S.C. 1823(c). In late March 1989, however, the FDIC denied MCorp's request, concluding that such financial assistance would not be in the public interest.

2. Soon after the FDIC's decision, three of MCorp's creditors filed an involuntary petition against MCorp in the United States Bankruptcy Court for the Southern District of New York. On March 28 and 29, 1989, the Comptroller of the Currency declared a total of 20 of MCorp's 25 subsidiary banks insolvent and, by operation of law, placed them under the receivership of the FDIC. On March 31, MCorp filed voluntary bankruptcy petitions in the United States Bankruptcy Court for the Southern District of Texas. App., *infra,* 2a-3a, 31a-32a.[6]

At this time, the Board issued a second notice of charges against MCorp. This notice alleged that MCorp had violated Section 23A of the Federal Reserve Act, 12 U.S.C. 371c, which, among other things, imposes collateral requirements on extensions of credit by a subsidiary bank to a nonbank affiliate.[7] And in late May 1989, the Board

[6] The voluntary and involuntary bankruptcy proceedings were later consolidated in the Southern District of Texas. App., *infra,* 3a.

[7] In particular, the notice claimed that MCorp had caused two of its closed banks to lend $63.7 million to MCorp Management without requiring sufficient collateral. App., *infra,* 3a.

issued a second amended notice of charges (relating to the original October 1988 notice), alleging that MCorp had failed to act as a "source of strength" to its five remaining subsidiary banks. App., *infra,* 3a.

3. Before the Board held an administrative hearing on the outstanding charges, MCorp filed an adversary bankruptcy proceeding against the Board in the Southern District of Texas. MCorp sought a temporary restraining order and a preliminary injunction to prevent the Board from prosecuting its administrative charges and taking further actions against MCorp without prior approval of the bankruptcy court. On May 3, 1989, the bankruptcy court denied MCorp's request for temporary relief. App., *infra,* 3a.

The Board then filed in the district court for the Southern District of Texas a motion to withdraw the reference of the adversary proceeding to the bankruptcy court. See 28 U.S.C. 157(d). The district court granted that motion on May 12, thereby agreeing to exercise jurisdiction over MCorp's request for injunctive relief. App., *infra,* 3a.

On June 9, the district court granted MCorp's motion and issued a preliminary injunction against the Board's administrative enforcement proceedings. App., *infra,* 29a-48a. The court concluded that the express jurisdictional limitation contained in FISA, 12 U.S.C. 1818(i)(1) – providing that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement" of any Board order, except as set forth in the statute – has "been overridden through control of the debtor's estate having been entrusted to the authority of the bankruptcy court." App., *infra,* 37a; see 28 U.S.C. 1334(d). Alternatively, the court determined that "the Board's generalized, diffuse interest in the holding company as well as the duplicative, distracting hearings militate for its being not exempt from the [automatic stay provisions of the Bankruptcy Code, 11

U.S.C. 362]." App., *infra,* 41a.[8]

C. The Court of Appeals Decision

In May 1990, the Fifth Circuit vacated the injunction with respect to proceedings on the Board's Section 23A charges,[9] but remanded with instructions to enjoin proceedings on the Board's source of strength charges because those "proceedings exceeded its statutory authority." App., *infra,* 2a.

With respect to its jurisdiction, the court of appeals concluded that

> the plain language of § 1818(i) deprives the district court of jurisdiction to enjoin the Board's administrative proceedings if the Board's actions do not exceed the authority Congress granted to it.

App., *infra,* 11a. Nevertheless, citing *Leedom* v. *Kyne,* 358 U.S. 184 (1958) and circuit precedent, the court determined that

> [i]f the Board's proceedings exceed its statutory authority, we may review the Board's action * * * despite the jurisdictional bar of § 1818; if the Board "was not acting within [the] authority granted by Congress, then 12 U.S.C. § 1818(i) could not withdraw jurisdiction."

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[8] Moreover, the court held that it had general equitable power under 11 U.S.C. 105 to enjoin the Board's proceedings that would threaten MCorp's assets or otherwise impede MCorp's reorganization. App., *infra,* 41a-42a.

[9] With regard to those proceedings, the court concluded that the Board has authority to regulate MCorp's relationships with former subsidiary banks. App., *infra,* 4a-11a. The court also concluded that the Board was "well within its authority in seeking an order against MCorp to cease and desist any transactions which violate the provisions of [Section 23A], or " 'to take affirmative action' as may be appropriate." App., *infra,* 13a (quoting 12 U.S.C. 1818(b)(1)).

App., *infra,* 11a (quoting *Manges* v. *Camp,* 474 F.2d 97, 99 (5th Cir. 1973)).

Turning to the Board's "source of strength" proceedings, the court of appeals rejected the argument that MCorp may not challenge the Board's authority because it has not exhausted its administrative remedies. In the court's view, "[t]he sole question presented is a legal one * * * [and that] legal issue * * * can be resolved without further factual development." App., *infra,* 14a-15a. On the merits, the court acknowledged that, under 12 U.S.C. 1842(c), the Board has "authority to consider financial and managerial soundness of subsidiary banks [when deciding whether] to grant or deny a holding company's application." App., *infra,* 20a (citing *First Lincolnwood Corp., supra*). But the court concluded that the BHCA "does not grant the Board authority to consider the financial and managerial soundness of the subsidiary banks after it approves the application." App., *infra,* 20a. Accordingly, the court held that "the Board is without authority under the BHCA to require [MCorp] to transfer its funds to its troubled subsidiary bank." App., *infra,* 21a.[10]

The court of appeals also rejected the Board's contention that "MCorp's failure to provide capital to its subsidiary banks is an unsafe or unsound practice which the Board may act to restrain under [FISA, 12 U.S.C. 1818]." App., *infra,* 21a. Applying the framework established by *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the court determined that "Congress has not spoken clearly to what constitutes an

[10] The court suggested that the Board was not necessarily without an adequate alternative to its "source of strength" regulations. In its view, "[a]s a condition to approving an application, the Board could possibly require the holding company to agree to maintain the subsidiary banks to some degree of financial soundness." App., *infra,* 21a n.5 (noting similar practice of the Office of Thrift Supervision).

unsafe or unsound practice, leaving the development of the phrase to the regulatory agencies." App., *infra,* 22a. The court therefore examined the "reasonableness" and "permissibility" of the Board's construction of that phrase, *i.e.,* that a "failure of the holding company to inject capital into subsidiary banks is an 'unsafe or unsound' practice." App., *infra,* 22a.

In the court's view, "[e]nforcement of the Board's source of strength regulation * * * can hardly be considered a 'generally accepted standard[ ] of prudent operation.' " App., *infra,* 23a (quoting 112 Cong. Rec. 26,474 (1966), cited in *Gulf Federal Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.,* 651 F.2d 259, 264 (5th Cir. 1981), cert. denied, 458 U.S. 1121 (1982)). Not only would such a transfer of funds require a holding company such as MCorp "to disregard its own corporation's separate status," that transfer also "would amount to a wasting of the holding company's assets in violation of its duty to shareholders." App., *infra,* 23a. Moreover, the court stated that the Board's regulations conflict with "one of the fundamental purposes of the BHCA," namely, "to separate banking from commercial enterprises," since those regulations would permit the Board "to treat a holding company as merely an extension of its subsidiary bank." App., *infra,* 23a.[11] Accordingly, the court concluded that

> the Board's determination that the holding company's failure to transfer its assets to a troubled subsidiary was an "unsafe or unsound practice" under §§ 1818(b)(1) and (3) is an unreasonable and impermissible interpretation of that term.

[11] In this regard, the court noted that Congress, in enacting and amending the BHCA in 1956 and 1966, "set forth detailed limits on transactions considered unsound between subsidiary banks and holding companies, without mentioning the infusion of capital by holding companies into subsidiaries." App., *infra,* 24a.

App., *infra*, 25a.[12]

REASONS FOR GRANTING THE PETITION

In striking down the Federal Reserve Board's source of strength policy, the court of appeals has invalidated a longstanding, frequently invoked, and critically important federal regulatory tool for safeguarding the stability of the Nation's banking institutions. The decision below rests on a flawed construction of the interrelated statutory schemes Congress established in the Bank Holding Company Act, the Financial Institutions Supervisory Act, and the International Lending Supervision Act, to empower the Board to supervise bank holding companies' activities regarding subsidiary banks. Such a substantial narrowing of the Federal Reserve Board's authority in this important regulatory arena calls for this Court's review.

Moreover, the court of appeals effectively reached out to nullify the Board's policy by misappropriating jurisdiction under the doctrine set forth in *Leedom* v. *Kyne*, 358

[12] On August 6, 1990, the court of appeals denied the Board's petition for rehearing and suggestion of rehearing en banc. App., *infra*, 27a-28a. On August 23, the court of appeals denied MCorp's motion for a stay of the mandate.

On remand from the court of appeals, the district court recently entered an order enjoining the Board from, among other activities, prosecuting its outstanding source of strength administrative charges against MCorp. Injunction on Remand ¶ 4, *MCorp* v. *Board of Governors*, No. H-89-1677 (S.D. Tex. Nov. 8, 1990). The Board's motion for a modification of that injunction is pending before the district court.

MCorp, through the pending bankruptcy proceedings, is currently pursuing plans to sell each of its remaining five subsidiary banks. MCorp has executed contracts to sell three of those banks. None of those transactions has been closed; one of the contracts has not yet received the requisite approvals from either the bankruptcy court or the Comptroller of the Currency.

U.S. 184 (1958). Such an exercise of jurisdiction – in the face of the express preclusion provision of 12 U.S.C. 1818(i)(1) – conflicts with this Court's decision in *Leedom* v. *Kyne*, and the decisions of other courts of appeals applying *Leedom*. In view of the substantial importance of the federal banking policy at stake, and the court of appeals' misuse of *Leedom* v. *Kyne* to circumvent the exclusive judicial review provisions crafted by Congress in FISA, further review by this Court is plainly warranted.

1. The court of appeals – by striking down the "source of strength" policy – has stripped the Federal Reserve Board of a critically important enforcement tool for safeguarding the stability of the Nation's banking institutions. Since enactment of the Bank Holding Company Act of 1956, the Board has frequently relied on the source of strength policy to bolster the capital reserves of weakened subsidiary banks, principally by initiating negotiations and other informal supervisory actions to obtain bank holding companies' cooperation in ensuring that banking subsidiaries remain adequately capitalized. Since the policy was first articulated, the Board – without resort to formal administrative proceedings – has managed to obtain hundreds of voluntary agreements, consent cease-and-desist orders, and memoranda of understanding that have required bank holding companies to inject capital into financially troubled subsidiaries.[13] The decision below,

[13] The specific terms and underlying circumstances of these source of strength enforcement actions are often unreported. This state of affairs stems from the fact that those actions are informal and from the Board's previous policy of keeping the terms of recapitalization agreements confidential in order to prevent a loss of public confidence in the banking institution. The Board, however, has noted the use of these voluntary "source of strength" agreements in its annual reports on enforcement actions. See, *e.g.*, *1989 Annual Report on Formal Enforcement Actions* 15, 17; *1988 Annual Report on Formal Enforcement Actions* 19; *1987 Annual Report on Formal Enforcement Actions* 13; *1986 Annual Report on Formal Enforcement Actions* 15; *1985 Annual Report on Formal Enforcement Actions* 16.

however, has now undermined the Board's legal authority to back these informal negotiations with the power to enforce its stated regulatory policies. As such, it casts considerable uncertainty over the Board's ability to secure holding companies' agreements to maintain the capital adequacy of subsidiary banks.

That uncertainty is particularly daunting today in light of the concentration of assets controlled by bank holding companies. As of 1990, holding companies controlled over 8,800 banks and 92 percent of the assets of all insured commercial banks in the country. See Board of Governors of the Federal Reserve System, *76th Annual Report, 1989,* at 170-171. The failure of even a small fraction of these subsidiary banks would undermine the stability of the banking system and drastically overburden the already strapped federal banking insurance system.[14] Indeed, the FDIC's plan to rescue those MCorp subsidiary banks that have already failed is alone expected to cost the insurance system $2 billion, making the plan the second most expensive bank rescue ever undertaken.

Absent recourse to the Board's source of strength policy, there are no alternative regulatory means of effectively redressing the substantial problems posed by inadequately capitalized subsidiary banks. The Comptroller of the Currency can issue capital directives instructing troubled subsidiary banks to obtain new financing. See 12 U.S.C. 3907(b)(2); 12 C.F.R. 3.15-3.21. But in the Board's experience, it is virtually impossible to persuade new investors to make minority position investments in weakened banks controlled by other, independent interests

[14] The General Accounting Office has recently reported to Congress that the federal bank insurance fund ended 1989 with a net loss of $852 million and that the ratio of the fund balance to insured deposits is at the lowest level ever recorded. See General Accounting Office, *Bank Insurance Fund* 5 (1990).

represented by bank holding companies, particularly where the holding companies themselves are unwilling to support their subsidiaries.

Under the "cross-guaranty" provisions of Section 206(e) of FIRREA, Tit. II, 103 Stat. 201 (to be codified at 12 U.S.C. 1818(e)), the FDIC can now order subsidiary banks to pay for losses incurred by the FDIC in disposing of failed banks within multibank holding company systems. These provisions, however, fall short of the Board's more potent authority under the source of strength regulations. The newly enacted cross-guaranty provisions do not authorize enforcement steps to be taken against the solvent holding companies themselves, and do not even come into play unless there has been a default or an imminent danger of collapse.

The regulatory vacuum created as a result of the court of appeals' decision poses substantial risks for the stability of the Nation's banking system. Once bank holding companies choose to abandon troubled subsidiaries, the holding companies have strong incentives to transfer valuable business operations and assets elsewhere, thereby further weakening the subsidiaries, increasing the likelihood of insolvency, and ultimately exposing the banking insurance fund to additional liabilities. Indeed, absent the source of strength regulations, bank holding companies could – subject to statutory limits on inter-affiliate transactions – routinely draw profits away from subsidiary banks in good years, but then allow them to slip unaided into insolvency in lean years. The court of appeals' decision could thus create an incentive for holding companies to maximize the short-term, cyclical profits of their subsidiary banks, regardless of risk, because the bank insurance fund – not the parent holding companies – would ultimately bear the costs if the subsidiaries later fail.

We recognize that the Fifth Circuit is the first court of appeals to consider the validity of the Board's source of

strength policy. Nonetheless, the decision below will likely have nationwide significance. According to statistics compiled by the Board, the number of national bank failures in the States that comprise the Fifth Circuit – Texas, Louisiana, and Mississippi – accounted for 62.7% of all bank failures in the United States in 1988, 76% of all bank failures in 1989, and 68.7% of all bank failures in 1990. On this issue, the Fifth Circuit is where the action is. Moreover, the General Accounting Office has recently notified Congress that the banks in the greatest danger of failing remain concentrated in, among other areas, the Southwest. General Accounting Office, *Bank Insurance Fund* 4 (1990). In other words, the court of appeals' decision divests the Federal Reserve Board – the principal regulator of bank holding companies – of the power to enforce capital standards on companies located in that part of the country where the threat to bank stability remains substantial and where additional capital infusions will most likely be needed.

2. The Fifth Circuit should not have even have had the opportunity to err. In reaching the issue of the validity of the Board's source of strength regulations, the court of appeals misapplied the doctrine set forth in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), to exercise jurisdiction despite FISA's explicit preclusion provision, 12 U.S.C. 1818(i)(1). The Fifth Circuit's misapplication is not only fundamentally inconsistent with this Court's decision in that case, it also conflicts with decisions from other circuits properly construing *Leedom*'s reach.[15]

[15] Moreover, by authorizing the district court to broaden its injunction on remand – in the absence of a cross-appeal filed by MCorp – the court of appeals may well have exceeded its appellate jurisdiction. See *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924).

a. In *Leedom*, union representatives challenged a National Labor Relations Board order including both professional and nonprofessional employees within the same collective bargaining unit without the professional employees' consent. 358 U.S. at 186. This Court held that although the bargaining unit certifications were not reviewable final orders under the National Labor Relations Act, the district court nonetheless had jurisdiction to consider the union's challenge. *Id.* at 191. The Court explained that that lawsuit was

> not one to "review," in the sense of that term as used in the [National Labor Relations] Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

Id. at 188. The Court noted that it could not "lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190. As a result, the Court concluded that, despite the governing statute's failure to provide for judicial review, Congress intended that the statutory rights violated by the NLRB remain judicially enforceable through the general jurisdiction of the federal courts. *Id.* at 190-91.

b. This Court has emphasized "the painstakingly delineated procedural boundaries of [*Leedom* v. *Kyne*]," making plain that the "*Kyne* exception [to statutory judicial review provisions] is a narrow one." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964); see *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 660 (1965). The court of appeals' invocation of *Leedom* – on the record presented here – ignores the Court's limitations in several critical respects.

First, *Leedom* neither held nor suggested that federal courts could invoke their "general jurisdiction" to review agency action, particularly where, as here, the governing statute itself provides an exclusive avenue of review that affords a full and complete means of securing judicial vindication of statutorily created rights. *Leedom*'s jurisdictional holding was largely predicated on the fact that the union had no other effective means of obtaining judicial review and thus would have been left without *any* judicial remedy for a right created by Congress. 358 U.S. at 190-91; see *id.* at 197 (Brennan, J., dissenting). This Court has recognized that where Congress *has* provided an avenue of judicial review, that avenue must be followed; as a result, claims of unlawful agency action must be resolved in the manner, time, and forum ordained by Congress. *E.g., Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.,* 379 U.S. 411, 419-423 (1965). For that reason, the courts of appeals – contrary to the decision below – have consistently rejected invocation of jurisdiction under *Leedom* v. *Kyne* where Congress has provided adequate, alternative means of judicial review of agency action.[16]

Here, Congress has certainly provided companies in MCorp's position an adequate means of obtaining judicial review over any question pertaining to an exercise of the Board's regulatory enforcement power or authority that has binding legal effect. The court of appeals was thus wrong to label 12 U.S.C. 1818(i)(1) a "jurisdictional bar."

[16] See, *e.g., Telecommunications Research and Action Center* v. *FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984); *Quivira Mining Co.* v. *EPA*, 728 F.2d 477, 484 (10th Cir. 1984), cert. denied, 474 U.S. 1055 (1986); *Compensation Dep't* v. *Marshall*, 667 F.2d 336, 343-344 (3d Cir. 1981); *Nor-Am Agricultural Products, Inc.* v. *Hardin*, 435 F.2d 1151, 1159-1160 (7th Cir. 1970) (en banc), cert. dismissed, 402 U.S. 935 (1971); but see *Greater Detroit Resource Recovery Auth. & Combustion Eng'g* v. *EPA*, No. 88-2269 (6th Cir. Aug. 30, 1990), slip op. 11.

App., *infra,* 11a. Rather, that statute provides only that no court shall have jurisdiction to affect any notice or order issued under FISA, "*except* as otherwise provided in [12 U.S.C. 1818]." 12 U.S.C. 1818(i)(1) (emphasis added). And 12 U.S.C. 1818(h)(2) expressly provides that any party subject to an order issued after a final decision under FISA may petition for review of that order in the appropriate United States Court of Appeals; the court of appeals then has exclusive jurisdiction to "affirm, modify, terminate, or set aside, in whole or in part, the order of the agency." 12 U.S.C. 1818(h)(2). The court of appeals' misuse of jurisdiction under *Leedom* v. *Kyne* thus circumvents the otherwise fully adequate scheme of judicial review Congress provided in FISA.

Second, this Court has stressed that jurisdiction under *Leedom* v. *Kyne* may not be invoked merely to "review" agency action. Rather, such an exercise of jurisdiction is appropriate only where necessary to remedy action that is manifestly beyond the agency's delegated authority and thus in excess of the agency's jurisdiction. *E.g., Brotherhood of Ry. & S.S. Clerks,* 380 U.S. at 659; *Boire* v. *Greyhound,* 376 U.S. at 481; *Leedom* v. *Kyne,* 358 U.S. at 188. The decision below brushed aside this limitation. Here, the court of appeals acknowledged that the Board's authority to promulgate and enforce its source of strength regulations ultimately turned on application of the framework set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). App., *infra,* 21a-22a. But the very existence of such an issue under the *Chevron* framework presupposes that Congress has not spoken to the precise issue at hand, and that the agency therefore has the jurisdiction and delegated authority to construe the meaning of the statutory provision.[17] For

[17] See, *e.g., K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 844 (1986).

that reason alone, invocation of *Leedom* v. *Kyne* is particularly inappropriate and amounts to wholesale circumvention of the congressional scheme for obtaining judicial review of final agency action.

Finally, since jurisdiction under *Leedom* v. *Kyne* is, as this Court recognized, exercised only to prevent an agency's *ultra vires* action from destroying otherwise legally cognizable rights, 358 U.S. at 190, such jurisdiction must be predicated on agency action that has binding legal effect on the aggrieved party. The court of appeals, however, jumped the gun and misapplied *Leedom* in the absence of legally binding agency action. In this case, the Board has only filed notices of charges and initiated administrative proceedings; the Board has neither found that MCorp violated any federal law or regulation, nor has the Board issued a final cease-and-desist order directing MCorp to take any corrective measures. The Board's preliminary steps are not the sort of final agency actions that constitute cognizable legal injury otherwise subject to judicial review. See *Federal Trade Comm'n* v. *Standard Oil Co.*, 449 U.S. 232 (1980). And in the absence of such an injury, *Leedom* v. *Kyne* offers scant support for federal courts to interfere with ongoing administrative proceedings, particularly where, as here, the lawfulness of such proceedings is fully reviewable upon issuance of a final agency decision (and where the statute, by precluding other avenues of judicial review, effectively calls for the exhaustion of administrative remedies).[18]

3. In invalidating the source of strength regulations, the court of appeals misconstrued the Federal Reserve

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[18] As the court of appeals correctly determined, in the absence of jurisdiction under *Leedom* v. *Kyne*, 28 U.S.C. 1334 does not otherwise provide jurisdiction to review the Board's initiation of administrative proceedings against MCorp. App., *infra*, 5a-11a.

Board's statutory authority, derived from the Bank Holding Company Act, the Financial Institutions Supervisory Act, and the International Lending Supervision Act, to supervise bank holding companies' activities that may adversely affect bank safety. The decision below is inconsistent with Congress's delegation of supervisory power to the Board and threatens to restrict the Board's delegated authority to exercise continuing control and supervision of bank holding company practices that impair the stability of the Nation's banking system.

a. Turning to the Board's authority under FISA, the court of appeals correctly recognized – as a threshold matter – that "Congress has not spoken clearly to what constitutes an unsafe or unsound practice, leaving the development of the phrase to the regulatory agencies." App., *infra*, 22a; accord *Investment Co. Inst.* v. *FDIC*, 815 F.2d 1540, 1550 (D.C. Cir.), cert. denied, 484 U.S. 847 (1987).[19] Consequently, the Board's conclusion that failure to act as a source of strength to subsidiary banks constitutes an unsafe or unsound practice must be upheld unless it is an unreasonable or impermissible construction of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 844. Contrary to the court of appeals' restrictive analysis, the Board's source of strength policy is a reasonable and sound interpretation of its statutory duty under ~~the~~ FISA to compel bank holding companies to cease and desist from "unsafe or unsound [banking] practices." 12 U.S.C. 1818(b)(1) and (3).

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[19] In considering FISA, Congress relied on the memorandum submitted by the then Chairman of the Federal Home Loan Bank Board, John Horne. Chairman Horne, in commenting on the proposed legislation, noted that the term "unsafe or unsound" practice would necessarily have a flexible application adapted to the circumstances of each case. 112 Cong. Rec. 26,474 (1966); see 112 Cong. Rec. 25,007-25,008 (1966).

First, the legislative record surrounding FISA's cease-and-desist authority shows that Congress intended to empower the Board to rectify bank holding company practices that adversely affect the safety and stability of subsidiary banks. As originally enacted in 1966, FISA's authority to remedy unsafe banking practices did not extend to bank holding companies. In 1974, however, Congress expressly brought bank holding companies within the reach of this regulatory power. See Act of Oct. 28, 1974, Pub. L. No. 93-495, Tit. I, § 110, 88 Stat. 1506 (codified at 12 U.S.C. 1818(b)(3)). In reporting out this legislation, the Senate Banking Committee explained that it

> believes that the principal concern of the Federal supervisory agencies in discharging their responsibilities under the Federal law should be with the soundness of affiliated financial institutions. It is clearly in the puiblic interest that these institutions remain sound and viable whether operated independently or as part of a holding company system. The cease and desist authority that the Committee recommends will, among other things, help prevent or terminate practices which might result in significant damage to depositors or to public confidence in the financial system.

S. Rep. No. 902, 93d Cong., 2d Sess. 10 (1974). Accordingly, the Board has acted well within its delegated authority in defining an unsafe bank holding company practice with reference to its impact on affiliated banks.

Second, the Board has reasonably determined that bank holding company activities (or failures to take steps) that allow subsidiary banks' capital reserves to fall below minimally acceptable standards constitute unsafe or unsound banking practices within the meaning of FISA, 12 U.S.C. 1818(b). Subsidiary banks' safety and stability depend, in

large measure, on their capital position. And as this Court has pointed out, "Congress has long regarded capital adequacy as a measure of bank safety." *First Lincolnwood Corp.*, 439 U.S. at 250. For that reason, in ILSA, Congress has authorized the Board—and other federal banking regulatory agencies—to establish minimum capital levels for the banking institutions under their supervision. See 12 U.S.C. 3907(a). Indeed, Congress has made plain that

> [f]ailure of a banking institution to maintain capital at or above its minimum level * * * may be deemed by the appropriate Federal banking agency, in its discretion, to constitute an unsafe and unsound practice within the meaning of [FISA, 12 U.S.C. 1818].

12 U.S.C. 3907(b).

Third, nothing in FISA precludes the Board from determining—as a matter of sound federal banking policy—that bank holding companies, despite their legal status as separate corporate entities, must ultimately remain accountable for the capital adequacy of their subsidiary banks. Had Congress intended that the Board uniformly observe a rigid distinction between holding companies and subsidiary banks, Congress assuredly would not have vested the Board with the power, under FISA, to rectify *holding company* practices that adversely affect *bank* safety.

Moreover, the strict separation of corporate entities demanded by the court of appeals' reasoning, see App., *infra*, 23a-25a, is belied by the economic realities of holding company operations. A holding company's subsidiary banks are—by definition—under the holding company's ownership or control. As expert observers have pointed out, a bank holding company, in some respects, functions as a single economic entity.[20] The holding company may

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[20] For example, the Chairman of the Federal Reserve Board recently told Congress:

well be separately incorporated, but that separate corporate status does not prevent it from deriving considerable economic benefits from its subsidiary banks. Indeed, the holding company derives distinct commercial advantages from control of institutions that, through their power to accept federally insured deposits, have the ability to attract capital and to make profitable loans and investments. The Board's source of strength policy insures that the relationship between the holding company and its banks does not become a one-way street permitting the holding company to derive the full benefit of federal deposit insurance and to maximize its own economic advantage without imposing correlative obligations to preserve bank safety or to prevent injury to depositors and the federal insurance system.

b. The Bank Holding Company Act – particularly its provision empowering the Board to consider the "future prospects" of subsidiary banks when approving acquisitions, 12 U.S.C. 1842(c) – further supports the Board's source of strength regulations. In *First Lincolnwood Corp.*, 439 U.S. at 250-252, this Court held that Section 3(c) of the BHCA, 12 U.S.C. 1842(c), authorizes the Board, when reviewing a proposed bank acquisition, to

> [T]he practical realities of the market place and the internal dynamics of a business organization under central direction drive bank holding companies to act . . . as one business entity, with the component parts drawing on each other for marketing and financial strength. Certainly, the market conceives of a bank holding company and its components in that way. And if market participants tend to consider the bank holding company as an integrated entity, problems in one part of the system will inevitably be transmitted to other parts.

S. Rep. No. 19, 100th Cong., 1st Sess. 9 (1987); see also Mayne, *New Directions in Bank Holding Company Supervision*, 95 Banking L.J. 729, 730-732 (1978).

consider whether a holding company can act as a source of strength to a subsidiary bank. Here, the court of appeals, in light of *First Lincolnwood,* limited the reach of Section 1842(c) to the acquisition stage. See App., *infra,* 18a-21a. That limitation is at odds with the statutory scheme of the BHCA, which vests the Board with broad powers to regulate holding companies' ongoing banking practices.

First, unless the Board can impose on holding companies a *continuing* obligation to act as sources of strength to subsidiary banks, the Board's undisputed power under Section 1842(c) to consider holding companies' resources when reviewing bank acquisitions would have virtually no impact on bank safety.[21] Such a state of affairs would be inconsistent with the mandate of Section 1842(c) that requires the Board to consider the "future prospects" of banks that may come under the holding company's control. Indeed, the Board's express statutory power to base the approval of a bank acquisition on the holding company's ability to protect the capital position of a proposed subsidiary would be nullified if the holding company has no continuing obligation to fulfill that requirement once the bank acquisition is completed.[22]

[21] To be sure, the court of appeals stated that "[a]s a condition to approving an application, the Board could possibly require the holding company to agree to maintain the subsidiary banks to some degree of financial soundness." App., *infra,* 21a n.5. The court's equivocal statement offers the Board little solace, since the Board – under the court's holding – would still lack any statutory basis for enforcing the source of strength policy against the thousands of banks that are already under holding company control.

[22] Although Section 1842(c), by its terms, does not empower the Board to consider the holding company's continuing compliance with the terms and conditions of the acquisition, the Board, under 12 U.S.C. 1844(b), has express authority to "issue such regulations and orders as may be necessary to enable it to administer and carry out the

Second, the entire statutory scheme of the BHCA governing the Board's authority over holding companies reflects Congress's intent that the Board exercise ongoing supervisory powers over holding company operations that affect the stability of subsidiary banks. Accordingly, Congress gave the Board the power to examine the financial transactions and records of each holding company and subsidiary, see 12 U.S.C. 1844(c) – a power this Court has characterized as "perhaps the most effective weapon of federal regulation of banking." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 329 (1963). In addition, Congress authorized the Board to curtail holding companies' ability to engage in "nonbank" activities that pose risks to the financial stability of subsidiary banks. See 12 U.S.C. 1843, 1844(e). These statutory provisions – among others[23] – show that Congress plainly intended to vest the Board with broad and substantial powers to regulate holding company practices that bear directly on the day-to-day integrity of banking subsidiaries. Cf. *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163 (1967). The Board's source of strength regulations thus further Congress's overarching objective of "assur[ing] that financial institutions are not endangered with respect to activities engaged

purposes of [the BHCA] and *prevent evasions thereof*" (emphasis added). Accordingly, the Board may reasonably regard a holding company's failure to adhere to the requirements governing its initial acquisition as an evasion of the purposes of the BHCA – an evasion that is remediable as an unsafe and unsound banking practice under FISA, 12 U.S.C. 1818(b)(1).

[23] As mentioned above, under ILSA, the Board has authority to establish minimum capital requirements for holding companies where necessary to promote bank safety. See 12 U.S.C. 3907, 3909(a)(2); 12 C.F.R. 263.35-263.40. And under FISA, the Board can order holding companies to cease and desist from engaging in unsafe banking practices. See 12 U.S.C. 1818(b).

in by parent holding companies." S. Rep. No. 902, *supra*, at 10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Board of Governors of the Federal Reserve System

DECEMBER 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 89-2816

MCORP FINANCIAL, INC., MCORP MGT., AND MCORP,
PLAINTIFFS-APPELLEES AND

OFFICIAL CREDITORS' COMMITTEE OF MCORP, MCORP FINANCIAL, INC., AND MCORP MGT.,
INTERVENORS-APPELLEES

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

May 15, 1990

Before: GARZA, WILLIAMS and DAVIS, *Circuit Judges.*

W. EUGENE DAVIS, *Circuit Judge*:

The Board of Governors of the Federal Reserve appeals an order of the district court sitting in bankruptcy, enjoining the Board from pursuing its enforcement actions against MCorp without district court approval. 101 B.R.

483. Because the Board's source of strength proceedings exceed its statutory authority, we remand with instructions to enjoin the Board from further prosecution of these charges. Because the district court lacks subject matter jurisdiction to enjoin the Board's actions on the remaining charges, we vacate the injunction as to these charges.

I.

In October 1988, the Board of Governors of the Federal Reserve (the Board), the primary regulator for bank holding companies, issued a notice of charges and of hearing against MCorp, a Texas-based bank holding company. The Board alleged that MCorp was engaging in unsafe and unsound practices, "likely to cause substantial dissipation of the assets of MCorp that could be used to allow MCorp to serve as a source of financial strength for the subsidiary Banks." A week later the Board issued an Amended Notice of Charges, which sought, among other things, to require MCorp to "implement[ ] an acceptable capital plan that would ensure that all of MCorp's available assets are used to recapitalize the Subsidiary Banks that are suffering capital deficiencies." MCorp's subsidiary banks were suffering heavy losses from real estate and energy loans.

In March 1989, three creditors of MCorp commenced an involuntary bankruptcy proceeding against MCorp in the U.S. Bankruptcy Court for the Southern District of New York. The Comptroller of the Currency (OCC), the primary regulator for national banks, subsequently declared a total of twenty of MCorp's subsidiary banks (MBanks) insolvent; OCC appointed the Federal Deposit Insurance Corporation (FDIC) as receiver, divesting MCorp of control of these banks. MCorp was left with five banks. MCorp and two of its subsidiaries, MCorp

Financial and MCorp Management then filed voluntary Chapter 11 bankruptcy petitions in the U.S. Bankruptcy Court for the Southern District of Texas. The bankruptcy proceedings against MCorp and its subsidiaries (hereafter collectively referred to as MCorp) were consolidated into one jointly administered proceeding in the Texas forum.

In March 1989, by notice of charges and hearing the Board also commenced further administrative proceedings against MCorp. The March charges accused MCorp and MCorp management of violations of § 23A of the Federal Reserve Act, alleging MCorp caused MBank Houston and MBank Preston, two of the closed banks, to provide MCorp management "unsecured extensions of credit." In late May the Board issued a second amended notice of charges, relating to the October notice of charges, alleging that MCorp had failed to act as a source of financial strength to its remaining subsidiary banks.

MCorp initiated an adversary proceeding against the Board in May 1989, and filed an Emergency Motion for a TRO and preliminary injunction, seeking to enjoin the Board from prosecuting its administrative proceedings against the debtors, and from initiating further administrative proceedings against the debtors without prior approval of the bankruptcy court. The bankruptcy court denied the TRO request. The Board moved the district court to withdraw the reference of the adversary proceeding to the bankruptcy court. The district court granted the Board's motion and placed the case on its own docket.

In June 1989, the district court entered a preliminary injunction granting the relief sought by the debtors. The district court preliminarily enjoined the Board from prosecuting its pending administrative proceedings and

> using its authority over bank holding companies or banks to attempt to effect, directly or indirectly, a reorganization of the MCorp group or its components

> or to interfere, except through participation in the bankruptcy proceedings, with the restructuring being developed in the bankruptcy proceeding.

The district court stated that the preliminary injunction left completely unaffected the Board's "general execution, supervisory and examination duties of the operations of MCorp and its bank subsidiaries and . . . central bank duties as they affect MCorp in common with all other institutions." The court established a procedure for future Board proceedings, where the Board was first required to present to MCorp any new administrative proceedings, notices of charges or temporary cease and desist orders before their issuance. If the Board and MCorp could not agree whether a proposed proceeding was subject to the preliminary injunction, the Board could then present that issue to the district court. If the court decided the Board's proposed action related to the banks' "operations," the court proposed to exempt this action from the restraint of the preliminary injunction; if however the Board's proposed action affected the reorganization, the district court proposed to stay this action in deference to the bankruptcy court.

The Board appealed the preliminary injunction to this court.

II.

A.

The Board contends first that the district court, sitting in bankruptcy, has no jurisdiction to enjoin the Board's prosecution of its administrative actions, because of 12 U.S.C. § 1818(i)(the Financial Institutions Supervisory Act of 1966 (FISA) as amended), which provides:

> except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

As we stated in *Groos National Bank v. Comptroller of Currency*, 573 F.2d 889 (5th Cir.1978), "section 1818(i) in particular evinces a clear intention that this regulatory process is not to be disturbed by untimely judicial intervention, at least where there is no 'clear departure from statutory authority.' " *Id.* at 895, *quoting Manges v. Camp*, 474 F.2d 97, 99 (5th Cir.1973). Thus, under 12 U.S.C. § 1818(h) and the Administrative Procedure Act (APA), a bank holding company is not ordinarily entitled to judicial review until the Board issues a final order.

MCorp's principal argument that the district court properly exercised subject matter jurisdiction is predicated on 28 U.S.C. §§ 1334(b) and (d). MCorp argues that these sections of the Bankruptcy Code effectively supersede the Board's exclusive jurisdiction under § 1818(i)(1) to prosecute its enforcement actions, and therefore empower the court to enjoin prosecution of those actions. The district court presumably agreed and concluded that § 1818(i) conflicted with §§ 1334(b) and (d) of the Bankruptcy Code.

Section 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The plain language of § 1334(b) does not purport to give the district court exclusive jurisdiction over matters arising under Title 11 to the exclusion of administrative agencies; rather, § 1334(b) grants the district court concurrent

jurisdiction over matters that otherwise would lie within the exclusive jurisdiction of another court.

The legislative history of § 1334(b) also supports the view that the section was intended to prevent another court from exercising exclusive jurisdiction over a matter brought within the Bankruptcy Code. The Commission on the Bankruptcy Laws of the United States, quoted at length in the House Judiciary Committee report, stated that "[the] first and most important objection to the present dispensation is the division of labor between the bankruptcy court and other courts." H.R.Rep. No. 595, 95th Cong., 1st Sess. 43 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6005. Under the prior bankruptcy law, the jurisdiction of the bankruptcy court was limited by the concepts of possession and consent. The House report adopted the reasoning of the Commission that the old law was undesirable because of "the frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding." *Id.* at 45, U.S.Code Cong. & Admin.News 1978, p. 6007. Under the prior jurisdictional scheme, " 'When a "summary" proceeding in the bankruptcy court is appropriate and when a plenary suit is required is one of the most involved and controversial questions in the entire field of bankruptcy,' " the Committee observed. *Id.* at 45, U.S.Code Cong. & Admin.News 1978, p. 6007. We are persuaded therefore that it was this division of jurisdiction between bankruptcy courts and *other courts* which the jurisdictional changes of the new law were intended to address.

MCorp argues that the legislative history explains that § 1334(b) grants bankruptcy courts pervasive jurisdiction over all matters and proceedings that arise in or in connection with bankruptcy cases. Yet the legislative history

reflects no intent that the bankruptcy court's jurisdiction supersede the exclusive jurisdiction of an administrative jurisdiction barred by § 1818.

In holding that § 1334 superseded § 1818(i), the district court did not harmonize the two statutes, but effectively repealed § 1818(i), and negated its basic sense and purpose of preventing early interference with administrative proceedings. This interpretation invested the district court, sitting in bankruptcy, with equitable power withheld from every other court by the language of § 1818(i). Implied repeals are highly disfavored, one statute will not be considered to impliedly repeal another unless there is a "positive repugnancy" between the two. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 189-190, 98 S.Ct. 2279, 2299-2300, 57 L.Ed.2d 177 (1978). We find no such irreconcilable conflict here. As the Supreme Court has stated:

> The "plain purpose" of legislation . . . is determined in the first instance with reference to the plain language of the statute itself. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.

Board of Governors v. Dimension Financial Corp., 474 U.S. 361, 373-74, 106 S.Ct 681, 688-89, 88 L.Ed.2d (1968)(citation omitted).

MCorp further contends that courts consistently have held that the phrase in § 1334(b), "[notwithstanding] any

act of Congress that confers exclusive jurisdiction on [any other] court," was expressly intended to confer on the bankruptcy courts jurisdiction over all matters related to a debtor's Chapter 11 case, including administrative proceedings, citing *In re Casey Corp.*, 46 B.R. 473 (S.D.Ind.1985), and *In re Shelby County Healthcare Services of Al., Inc.*, 80 B.R. 55 (N.D.Ga.1987). The district court relied in part upon *Casey* in holding that § 1334 superseded the jurisdictional bar of § 1818(i). These cases are not binding upon this court, however, nor do we find their reasoning persuasive as to the issue before us.

MCorp argues next that the bankruptcy court has exclusive jurisdiction over the Board's enforcement proceeding based on § 1334(d), which provides:

> The district court in which a case under title 11 is commenced or is pending shall have *exclusive* jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate. (emphasis added).

According to MCorp, because the bankruptcy court has exclusive control of MCorp's assets, it necessarily follows from the above section that the Board had no jurisdiction over MCorp. But the Board has not sought control over the property of MCorp's estate in this action, only the opportunity to go forward in its administrative proceedings. Nor at this early stage do we find the Board's enforcement actions to be sham proceedings, brought as a means of controlling the debtor's assets. We therefore do not consider § 1334(d) to grant the district court exclusive jurisdiction here.

MCorp relies on *In re Modern Boats, Inc.*, 775 F.2d 619 (5th Cir.1985), and *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025 (5th Cir.1985), to support its argument. *Louisiana Ship Management* and *Modern Boats* both

involved in rem proceedings in admiralty where vessels were under seizure. We held that once a chapter 11 petition was filed, the court where that petition was filed enjoyed exclusive jurisdiction over the vessels subject to a maritime lien and that the admiralty court had no jurisdiction over the property. MCorp's reliance on these cases is misplaced because the Board's proceedings do not directly concern the debtor's property.

MCorp also argues that because the above Bankruptcy Code provisions were enacted after § 1818, and do not exempt bank holding company administrative actions from the comprehensive jurisdiction of the bankruptcy court, Congress must have intended no such exemptions. MCorp contends that this is especially true in view of the express exemption granted banks from recourse to bankruptcy protection in § 109 of the Bankruptcy Code. Absent some clear intention to the contrary, however, a specific statute will not be controlled by a general one regardless of the priority of enactment. *Crawford Fitting Co. v. J.T. Gibbons. Inc.*, 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). Congress revealed no intent to supersede the specific jurisdictional bar of § 1818(i) in the legislative history of the Bankruptcy Reform Act, nor in the recently enacted Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. No. 101-73, 103 Stat. 183. We decline to imply any affirmative powers to the bankruptcy court from Congress' failure to act in this area.

In analogous circumstances, several circuits have held that the automatic stay provisions of the Bankruptcy Code in the case of a bankrupt employer do not supersede the anti-injunction provision of the Norris-LaGuardia Act, which precludes courts from enjoining union conduct. In *In Re Crowe & Associates. Inc.*, 713 F.2d 211, 214-16 (6th Cir.1983), the Sixth Circuit concluded that the legislative

history of the Bankruptcy Reform Act was silent as to the anti-injunction provisions of the Norris-LaGuardia Act, and this silence was "self-evident proof that Congress never intended to supersede or transcend [the Norris-LaGuardia Act], since we cannot believe that the Norris-LaGuardia Act was to be superseded *sub silentio.*" *Id.* at 215, *quoting In re Petrusch,* 667 F.2d 297, 300 (2d Cir. 1981); *see also Briggs Transportation Co. v. International Brotherhood of Teamsters,* 739 F.2d 341, 343 (8th Cir.1984)("the parties have cited us to nothing in the Bankruptcy Code or its legislative history indicating a congressional intent to lift the jurisdictional restrictions of the Norris-LaGuardia Act").

The Board also relies on *Becker's Motor Transportation, Inc. v. Needham's Motor Service, Inc.*, 632 F.2d 242 (3d Cir.1980), *cert. denied,* 450 U.S. 916, 101 S.Ct. 1358, 67 L.Ed.2d 341 (1981), in which the court held independent statutory provisions barring any suit to restrain the assessment or collection of taxes deprived the bankruptcy court of the authority to enter an injunction against the government's tax collection efforts. In reaching this conclusion the Third Circuit in *Becker's Motor* distinguished *Bostwick v. United States,* 521 F.2d 741 (8th Cir.1975), a tax injunction case relied upon by MCorp and the lower court in which the Eighth Circuit reached the contrary result. The court in *Becker's Motor* concluded that the *Bostwich* court created a judicial exception to the tax anti-injunction statute in contravention of clear congressional intent. *Becker's Motor,* 632 F.2d at 246. We agree with the Third Circuit that absent clear congressional intent any argument for permitting the bankruptcy court's jurisdiction to supersede existing anti-injunction legislation should be addressed to Congress, and we will not imply the repeal of such legislation.

For the above reasons, we conclude that the plain language of § 1818(i) deprives the district court of jurisdiction to enjoin the Board's administrative proceedings if the Board's actions do not exceed the authority Congress granted to it. We turn next to MCorp's argument that the Board is exceeding its statutory authority.

B.

MCorp asserts that the Board lacks authority to proceed against banks in FDIC receivership, that the Board's self-dealing charges are a pretext for avoiding the exclusive jurisdiction of the bankruptcy court over MCorp's assets, and that the Board's source of strength policy is without statutory authority.

In *Manges v. Camp,* 474 F.2d 97 (5th Cir.1973), we recognized that the statute at issue here, § 1818, that withdraws the jurisdiction of the court in deference to an agency, is not effective when the agency exceeds its authority under that statute. There is "a very strong court created exception to withdrawal statutes. This exception comes into play when there has been a clear departure from statutory authority, and thereby exposes the offending agency to review of administrative action otherwise made unreviewable by statute." *Manges,* 474 F.2d at 99. If the Board's proceedings exceed its statutory authority, we may review the Board's action prior to a final order despite the jurisdictional bar of § 1818; if the Board "was not acting within [the] authority granted by Congress, then 12 U.S.C. § 1818(i) could not withdraw jurisdiction." *Manges,* 474 F.2d at 99.

The Supreme Court established this exception in *Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct 180, 3 L.Ed.2d 210 (1958). In *Leedom* the Court found district court review proper, despite an express preclusion provision,

where the National Labor Relations Board had acted in excess of its delegated powers.

The Court stated in *Leedom* that "[t]his suit is not one to 'review,' in the sense of that term as used in the [National Labor Relations] Act, a decision of the [National Labor Relations] Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers. . . ." *Leedom,* 358 U.S. at 188, 79 S.Ct. at 183. The D.C. Circuit recently characterized the *Leedom* rule as one permitting a court in the face of a withdrawal statute to determine "whether an agency has acted 'in excess of its delegated powers' " and "whether the agency action 'on its face' violated a statute." *Dart v. United States,* 848 F.2d 217, 222 (D.C.Cir.1988). *See Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.,* ___ U.S. ___, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989); *Breen v. Selective Service Local Board,* 396 U.S. 460, 90 S.Ct. 661, 24 L.ed.2d 653 (1970); *Oestereich v. Selective Service System Local Board,* 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402 (1968). *Cf. Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 680 n. 11, 106 S.Ct. 2133, 2141 n. 11, 90 L.Ed.2d 623 (1986).

MCorp argues that the Board exceeded its authority in three respects because it has no authority to (1) regulate MCorp's relationships with *former* MBanks, now under FDIC receivership, which are the subject of the administrative proceedings; (2) assist the FDIC, as receiver of the closed MBanks, to obtain damages under the pretext of punishing MCorp for violations of § 23A of the Federal Reserve Act[1] which concerns self-dealing among

[1] Section 23A of the Federal Reserve Act, 12 U.S.C. § 371c, prohibits a bank from extending credit to a nonbank affiliate unless the extension of credit is secured by collateral having a market value of at

holding company subsidiaries; and (3) compel a bank holding company to transfer its funds to subsidiary banks.

MCorp argues first that the Board lacks authority to regulate MCorp's relationships with former subsidiary banks now under FDIC receivership. Both the "source of strength" charges and the self dealing charges, as initially set out by the Board, were levelled in part to the relationship between MCorp and MBanks which were later closed and placed under FDIC receivership. We are persuaded that the Board is at least entitled to make a determination on the legitimacy of the credit transaction with the closed banks at issue to allow it to evaluate what remedy it wants to pursue against MCorp. Certainly the Board's attempt to do that is not facially invalid.

MCorp next argues that the Board's § 23A proceeding is simply an attempt to assist the FDIC to obtain MCorp's property under the guise of remedying a violation of § 23A of the Reserve Act. We disagree. The Board is well within its authority in seeking an order against MCorp to cease and desist any transactions which violate the provisions of § 23A, or "to take affirmative action" as may be appropriate. 12 U.S.C. § 1818(b)(1). The notice of charges relating to the appropriateness of the credit transactions between an MCorp nonbank subsidiary and two of MCorp's former subsidiary banks is not on its face a sham proceeding initiated only to assist the FDIC to collect damages; at least a fact issue is presented on the merits of the § 23A charges. The mere prosecution of the charges before the Board does not in itself disturb the bankruptcy

least 100 percent of the loan. The Board has charged that MCorp violated this requirement by causing two of its former subsidiary banks to extend $63.7 million of unsecured credit to an affiliated subsidiary of MCorp, and failing to make timely repayments to the subsidiary banks that extended the credit.

court's alleged exclusive jurisdiction over MCorp's property under § 1334(d).

We are persuaded, however, that a serious legal issue is presented as to whether the Board has statutory authority to pursue its source of strength charges. Before turning to that problem, we address a threshold argument of the Board that we are precluded from considering the Board's authority to proceed.

The Board contends that MCorp may not judicially challenge at this stage the Board's authority to proceed with its charges because MCorp has not exhausted its administrative remedies. The Board relies on *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938), in which the Court stated that "[j]udicial relief is not normally available for supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.* at 50, 58 S.Ct. at 463.

Myers did not present a challenge to the agency's authority to act on the complaint presented to it. The petitioning employer factually challenged the interstate nature of the employer's business, one of the elements of the NLRB's charge. The Court concluded that this factual determination should be made by the NLRB. The Supreme Court held that a federal district court is without jurisdiction to enjoin the NLRB from "hearing and determining what Congress declared the [National Labor Relations] Board should hear and determine in the first instance." *Id.* at 50-51, 58 S.Ct. at 463-464 (footnote omitted).

The question of the Board's authority to impose its source of strength requirement is quite a different issue. No facts are in dispute. The sole question presented is a legal one: whether the Board has authority to order a holding company to transfer its funds to its troubled subsidiary banks. The Board has instituted proceedings to re-

quire that holding company to transfer those funds. The legal issue of the Board's authority can be resolved without further factual development. "[P]rompt resolution will eliminate uncertainty and be in the interest of efficient judicial administration." *Indep. Bankers Ass'n v. Heimann,* 613 F.2d 1164, 1167 (D.C.Cir.1979), *cert. denied,* 449 U.S. 823, 101 S.Ct. 84, 66 L.Ed.2d 26 (1980). Because we conclude that MCorp is not required to exhaust its administrative remedies in this circumstance, we turn to the merits of whether the Board has authority to require the holding company to transfer its funds to troubled subsidiary banks.

The Board contends it has authority to issue the source of strength charges under §§ 1818(b)(1) and (3), which empower it to file charges against a bank holding company which the Board believes (1) has violated or is about to violate a "law, rule or regulation"; or (2) is engaging in an "unsafe or unsound" practice.[2] The Board contends that

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[2] Termination of status as insured depository institution, Section 1818 which is captioned in § (b)(1) and (3):

> (b) Cease-and-desist proceedings
>
> (1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution . . . is engaged or has engaged, or the agency has reasonable cause to believe that the depository institution . . . is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation . . . the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. . . .
>
> (3) This subsection . . . shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956. . . . Nothing in this subsection or in subsection (e) of this section shall authorize any Federal banking agency, other

MCorp has failed to act as a source of strength for its bank subsidiaries in violation of the Board's regulations and policy statements. The Board also contends that this failure constitutes an unsafe or unsound practice in violation of § 1818.[3]

We consider first whether the authority the Board assumed under its regulation and policy statement exceeds its statutory grant. The Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. § 1841 et seq., grants the Board supervisory control over the formation, structure and operation of bank holding companies and their nonbank subsidiaries. Section 3(a) of the Act, 12 U.S.C. § 1842(a), provides that no company may acquire control of a bank without prior approval by the Board. In determining whether to approve an application, § 3(c) of the Act, 12 U.S.C. § 1842(c), directs the Board to consider "the financial and managerial resources and future prospects of the company or companies and the banks concerned."[4]

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than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank).

12 U.S.C. §§ 1818(b)(1) and (3), *amended by* FIRREA, Pub.L. No. 101-73, §§ 901(d), 902(a)(1)(A).

[3] Because we conclude that the source of strength proceedings exceed the Board's statutory authority, we need not resolve whether the source of strength charges relating to MCorp's former subsidiary banks are beyond the Board's authority.

[4] Section 1842 states in relevant part:

Acquisition of bank shares or assets

* * *

(c) Factors governing determination of application for approval

. . .

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

In 1984, as part of its comprehensive revision of Regulation Y, the Board added 12 C.F.R. § 225.4(a)(1), which provides:

> § 225.4 Corporate practices.
>
> (a) *Bank holding company policy and operations.* (1) A bank holding company shall serve as a source of financial and mangerial strength to its subsidiary banks and shall not contuct [*sic*] its operations in an unsafe or unsound manner.

Revision of Regulation Y, 49 Fed.Reg. 820 (1984) (codified at 12 C.F.R. § 225.4(a)(1)).

In April 1987, the Board published a policy statement in the Federal Register, which further provided:

> It is the policy of the Board that in serving as a source of strength to its subsidiary banks, *a bank holding company should stand ready to use available resources to provide adequate capital funds to its subsidiary banks* during periods of financial stress or adversity and should maintain the financial flexibility and capital-raising capacity to obtain additional resources for assisting its subsidiary banks. . . .
>
> A bank holding company's failure to meet its obligation to serve as a source of strength to its subsidiary bank(s), including an unwillingness to provide appropriate assistance to a troubled or failing bank, will generally be considered an unsafe and unsound banking practice or a violation of Regulation Y, or both. . . .

Policy Statement, 52 Fed.Reg. 15707, 15708 (1987) (emphasis added). This policy statement was effective April 24, 1987. The Board solicited comments on the policy, with a view to revising the statement in light of such comments. No subsequent revision has been published.

The Board also relies on the broad language of § 5(b) of the BHCA, 12 U.S.C. § 1844(b), for authority to issue the above regulation and policy statement. Section 5(b) states:

> The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof.

The Board finds support for its authority to enforce its source of strength requirements in *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 99 S.Ct. 505, 58 L.Ed.2d 484 (1978). In this case the Court considered whether the BHCA authorized the Board to disapprove an application of a proposed bank holding company solely on grounds of financial unsoundness, and in the absence of any anticompetitive effects resulting from the transaction. The Supreme Court answered this question in the affirmative and upheld the Board's rejection of a proposed holding company's application. This holding was based on the statutory language of 12 U.S.C. § 1842(c), as well as the legislative history of the BHCA. The Supreme Court stated:

> The language of the statute supports the Board's interpretation of § 3(c) as an authorization to deny applications on grounds of financial and managerial unsoundness even in the absence of any anticompetitive impact. Section 3(c) directs the Board to consider the financial and managerial resources and future prospects of the applicants and banks concerned "[i]n every case," not just in cases in which the Board finds that the transaction will have an anticompetitive effect.

Id. at 243, 99 S.Ct. at 510.

In response to the court of appeals' holding that the Board's authority to deny an application because of unsound financial or managerial consideration was limited to instances in which the unsoundness was caused or exacerbated by the proposed transaction, the Court stated:

> Indeed, the Court of Appeals' construction of the statute would require the Board to approve formation of a bank holding company with corrupt management simply because management would become no more corrupt by virtue of the transaction. We hesitate to adopt a construction that would yield such an anomalous result.

Id. at 250, 99 S.Ct. at 514.

Finally, addressing the arguments of the dissent, the Court stated that its holding was not intended to extend the Board's authority to day-to-day supervision of banks, but allowed the Board to disapprove an application to prevent the formation of an unsound holding company.

> In the dissent's view, the Board, by looking beyond the transaction before it, attempted to exercise the day-to-day regulatory authority over banks which Congress denied to it and conferred on the Comptroller. We disagree with the basic premise of the dissent's argument. As the Board found, the *effect* of this transaction would have been the formation of a financially unsound bank holding company. Thus, the Board's attempt to prevent this effect and to induce respondent to form an enterprise that met the Board's standards of financial soundness was entirely consistent with the language the dissent cites.

Id. at 252 n. 18, 99 S.Ct. at 515 n. 18 (emphasis added). In *First Lincolnwood,* therefore, the Court relied upon the express provisions of § 3(c) that required the Board to consider financial soundness of the subsidiary bank in determining whether to approve a holding company's application. The Court made it clear that it did not read the

BHCA to grant the Board authority to regulate the day-to-day financial soundness of the subsidiary banks.

The Supreme Court in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986), considered whether the Board exceeded its authority in expanding certain definitions in Regulation Y. The Board, as part of Regulation Y, included institutions that were not banks within the Board's regulatory ambit. The Court concluded that the Board had exceeded its authority in attempting to regulate the "non-bank banks."

The Court found that the BHCA "vests broad regulatory authority in the Board over bank holding companies 'to restrain the undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit.' " *Id.* at 365, 106 S.Ct. at 684, *quoting* S.Rep. No. 91-1084 (1970), U.S.Code Cong. & Admin.News 1970, p. 5541. The Board's new definitions did not fall within the plain purposes of the BHCA, the Court concluded. The Court added that "§ 5 only permits the Board to police within the boundaries of the Act. . . ." *Id.* at 373 n. 6, 106 S.Ct. at 688 n. 6.

First Lincolnwood and *Dimension Financial* together teach that the primary purposes of the BHCA are to prevent the concentration of control of banking resources, and to separate banking from non-banking enterprises. *First Lincolnwood* is narrowly written and expressly limits the Board's authority to consider financial and managerial soundness of subsidiary banks to the Board's decision to grant or deny a holding company's application. Section 3(c) of the BHCA specifically grants this authority to the Board. The BHCA does not grant the Board authority to consider the financial and managerial soundness of the subsidiary banks after it approves the application, and *First Lincolnwood* finds this regulatory authority lacking

in the day-to-day operations of a subsidiary bank. For these reasons, we conclude that the Board is without authority under the BHCA to require MBank to transfer its funds to its troubled subsidiary bank.[5]

The Board asserts as an independent basis for its source of strength regulation, policy statement and enforcement proceedings its broad authority under § 1818(b)(1) and (3) of FISA to order a holding company to cease and desist from any activity that, in the Board's judgment, constitutes an unsafe or unsound practice. The Board argues that MCorp's failure to provide capital to its subsidiary banks is an unsafe or unsound practice which the Board may act to restrain under § 1818.

In determining whether we should accept the Board's interpretation of a statute the Board is charged with enforcing, we look to the test established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense*

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[5] As a condition to approving an application, the Board could possibly require the holding company to agree to maintain the subsidiary banks to some degree of financial soundness. The Federal Home Loan Bank Board (FHLBB) has long followed this practice in approving savings and loan holding company applications; in 1981, we approved the practice in *Kaneb Services, Inc. v. Federal Sav. & Loan Ins. Corp.*, 650 F.2d 78 (5th Cir.1981). The statutory authority of the FHLBB to regulate savings and loan holding companies is practically identical to the authority granted the Board to regulate bank holding companies. *See* 12 U.S.C. §§ 1730(e)(1) and (3), 1730a(e)(2); Regulatory Capital Maintenance Obligations of Acquirers of Insured Institutions, 53 Fed.Reg. 31761 (1988); Acquisition of Control of Insured Institutions, 54 Fed.Reg. 32959 (1989)(to be codified at 12 C.F.R. § 574.7(a)(1) and (3)). The Office of Thrift Supervision, the successor to the FHLBB as primary regulator of savings and loan holding companies after FIRREA, continues this practice in its current regulations. *See* Transfer and Recodification of Regulations Pursuant to Financial Institutions Reform, Recovery and Enforcement Act, 54 Fed.Reg. 49411 (1989).

Council, Inc. 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

> If Congress has spoken clearly to the issue presented in a case, that intent controls. 467 U.S. at 844 [104 S.Ct. at 2782]. If the agency's interpretation is contrary to the clear intent of Congress, the agency's interpretation is invalid. If, on the other hand, Congress has no clear intent as to the particular question at issue, the courts may invalidate the agency's interpretation only if it is "unreasonable" or "impermissible." *Id.*

Investment Co. Institute v. Federal Deposit Ins. Corp., 815 F.2d 1540, 1546 (D.C.Cir.), *cert. denied*, 484 U.S. 847, 108 S.Ct. 143, 98 L.Ed.2d 99 (1987). *See also American Insurance Assoc. v. Clarke*, 865 F.2d 278, 280-81 (D.C.Cir.1988).

The Congress has not spoken clearly to what constitutes an unsafe or unsound practice, leaving the development of the phrase to the regulatory agencies. As we stated in *Groos Nat'l Bank v. Comptroller of Currency*, 573 F.2d 889, 897 (5th Cir. 1978), "[t]he phrase 'unsafe or unsound banking practice' is widely used in the regulatory statutes and in case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies." Thus, under the *Chevron* analysis, in the absence of clear congressional intent on the meaning of this language, we must examine the "reasonableness" and "permissibility" of the Board's interpretation that the failure of the holding company to inject capital into subsidiary banks is an "unsafe or unsound" practice.

In *Gulf Federal Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 651 F.2d 259 (5th Cir.1981), *cert. denied*,

458 U.S. 1121, 102 S.Ct. 3509, 73 L.Ed.2d 1383 (1982), the Federal Home Loan Bank Board found that Gulf Federal's contracting practice was an "unsafe or unsound" practice within the meaning of § 1818. We disagreed and concluded that the FHLBB's finding that Gulf Federal's use of inconsistent contract terms was an unsafe or unsound practice was not a reasonable interpretation of the "unsafe or unsound practice" provision.

We also noted in *Gulf Federal* that the "unsafe or unsound practice" provision was the subject of lively congressional debate at the time the statute was enacted. We observed that the authoritative definition of an unsafe or unsound practice, adopted in both Houses, was that:

> Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.

Id. at 264, *quoting* 112 Cong.Rec. 26474 (1966). *See* 112 Cong.Rec. 24984, 26474 (1966).

Enforcement of the Board's source of strength regulation requiring MCorp to transfer MCorp's funds to the troubled subsidiary banks can hardly be considered a "generally accepted standard[ ] of prudent operation." Such a transfer of funds would require MCorp to disregard its own corporation's separate status; it would amount to a wasting of the holding company's assets in violation of its duty to its shareholders. Also, one of the fundamental purposes of the BHCA is to separate banking from commercial enterprises. That purpose is obviously not served if the Board is permitted to treat a holding company as merely an extension of its subsidiary bank.

Congress first under the BHCA in 1956 and later in amendments to the Federal Reserve Act in 1966 has generally defined with specificity the dealings between subsidiary banks and nonbank affiliates, including holding companies, it considered unsafe and unsound. *See* Bank Holding Company Act of 1956, c. 240, § 6, 70 Stat. 137, *repealed by* Pub.L. No. 89-485, § 9, 80 Stat. 240 (1966); Pub.L. No. 89-485, § 12(a)(amending 12 U.S.C. § 371c). *See also* S.Rep. No. 1179, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.Code cong. & Admin.News 2394-96. Congress made no effort in any of this legislation to require holding companies to make capital injections into subsidiary banks as part of these safeguards. Congress noted only that the provision enacted as part of the BHCA "does not prohibit the borrowing of funds by any subsidiary in the system from the parent bank holding company." S.Rep. No. 1095, 84th Cong., 1st Sess., *reprinted in* 1956 U.S.Code Cong. & Admin.News 2482, 2496. In sum, Congress set forth detailed limits on transactions considered unsound between subsidiary banks and holding companies, without mentioning the infusion of capital by holding companies into subsidiaries. This strongly supports MCorp's argument that Congress never intended to grant authority to the Board to require a holding company to inject capital into subsidiary banks as a safeguard against "unsafe or unsound" practices.

This is consistent with the conclusion reached by the Shadow Financial Regulatory Committee,[6] responding to the Board's source of strength policy. The Committee

[6] Formed in February 1986, the Shadow Financial Regulatory Committee (SFRC) meets periodically to monitor regulations of the financial services industry. The SFRC is composed of economists, academics and former financial regulators.

stated that, "while Congress has empowered regulators of banks to issue capital directives to institutions in their charge, it has not authorized the Fed to issue capital directives to bank holding companies." 48 Banking Rep. (BNA) No. 21, at 923 (May 25, 1987).

Thus, we conclude that the Board's determination that the holding company's failure to transfer its assets to a troubled subsidiary was an "unsafe or unsound practice" under §§ 1818(b)(1) and (3) is an unreasonable and impermissible interpretation of that term.

It is not our role to pass judgment on the wisdom of the scheme Congress put in place to regulate bank holding companies. Similarly, the Board cannot exceed the authority Congress granted to it to correct perceived flaws in the congressional scheme. As the Supreme Court stated in *Dimension Financial:*

> The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.
>
> If the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the Courts, to address.

474 U.S. at 374, 106 S.Ct. at 688-689 (footnote omitted).[7]

[7] The Board also asserts on appeal that its administrative proceedings are exempt from both the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(b), and the general equitable power of the bankruptcy court under § 105 of the Code. Because we find that the district court, sitting in bankruptcy, lacks jurisdiction over the Board's ongoing enforcement actions, we need not address MCorp's argument that the Bankruptcy Code's stay provisions prevent the Board from proceeding.

III.

Because we find that the Board's source of strength proceedings exceed its statutory authority, we remand this case to the district court with instructions to enjoin the Board from further prosecution of this charge. The remaining preliminary injunction entered by the district court is vacated because it lacked subject matter jurisdiction to interfere with the Board's § 23A proceedings.

REVERSED, VACATED and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 89-2816

MCORP FINANCIAL, INC., MCORP MGT., AND MCORP, PLAINTIFFS-APPELLEES AND

OFFICIAL CREDITORS' COMMITTEE OF MCORP, MCORP FINANCIAL, INC., AND MCORP MGT., INTERVENORS-APPELLEES

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

[Filed Aug. 6, 1990]

ON PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

Before: GARZA, WILLIAMS and DAVIS, *Circuit Judges.*

PER CURIAM:

(X) The petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. EUGENE DAVIS
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civ. A. No. 89-1677
Bankruptcy No. 89-02312-H3-11
Adv. No. 89-0298

IN RE MCORP, MCORP FINANCIAL, INC., AND MCORP MANAGEMENT, DEBTORS.

MCORP, MCORP FINANCIAL, INC., AND MCORP MANAGEMENT, DEBTORS IN POSSESSION, PLAINTIFFS, AND OFFICIAL CREDITORS' COMMITTEE, INTERVENOR

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA, DEFENDANT

[Filed June 19, 1989]

OPINION ON THE PRELIMINARY INJUNCTION AGAINST THE FEDERAL RESERVE SYSTEM

HUGHES, *District Judge*.

1. ***Introduction.***

As debtor in possession, a bank holding company and two of its nonbank subsidiaries (MCorp, MCorp Finan-

cial, Inc., and MCorp Management [Debtor]) applied for a preliminary injunction against the Board of Governors of the Federal Reserve System (Board). The Debtor seeks to enjoin the Board from prosecuting administrative proceedings against the holding company and its nonbank subsidiaries as part of the Board's regulation of the safety and integrity of the bank subsidiaries. The issue is whether a nonbank corporation that owns banks and nonbanks as subsidiaries is entitled to have its bankruptcy case principally directed by the banking agencies or by the bankruptcy process. An injunction will be issued to allow possible reorganization of the Debtor through the bankruptcy court.

2. *Statutes.*

The Debtor asserts:

A. This court sitting in bankruptcy has exclusive jurisdiction over all the property in the debtor's estate. 28 U.S.C. § 1334(d);

B. The Board's actions are in reality an attempt to control the assets of the estate in violation of the automatic stay. 11 U.S.C. § 362(a).

C. If the Board is exempt from the automatic stay, the bankruptcy code authorizes an injunction to protect the debtor from third-party interference. 11 U.S.C. § 105.

The Board counters:

A. The Financial Institutions Supervisory Act (FISA) withdraws jurisdiction from the courts, superseding the automatic stay imposed by the bankruptcy code. 12 U.S.C. § 1818(i).

B. The Board's proceedings are regulatory actions exempted from the automatic stay. 12 U.S.C. § 1818(b); 11 U.S.C. § 362(b).

C. The character of the regulation and the general scheme of banking supervision are not the third-party acts that should be subject to an injunction against interference with a bankruptcy case.

3. *Background of the Controversy.*

At the beginning of 1989, MCorp was a bank holding company, owning twenty-five bank subsidiaries and several nonbank subsidiaries. In common with many financial institutions, MCorp has suffered large, continuing losses from its real estate loans, having already written down its bad oil-related loans. In March, the comptroller of the currency declared twenty of MCorp's banks insolvent and closed them. The banks continued to operate as nationalized receiverships through the Federal Deposit Insurance Corporation under the name Deposit Insurance Bridge Bank.

This civil action was an adversary proceeding in the consolidated bankruptcy case to reorganize MCorp, and the reference by the district court to the bankruptcy court was withdrawn. (Adversary Number 89-0298.) The other actions are:

A. An involuntary petition was filed in the Southern District of New York against MCorp and it was transferred here to pend under Case Number 89-02848-H2-11.

B. A voluntary petition was filed in the Southern District of Texas by MCorp Management under Case Number 89-02324-H5-11.

C. A voluntary petition was filed in the Southern District of Texas by MCorp Financial, Inc., under Case Number 89-02312-H3-11.

The filing in New York of the involuntary case precipitated the bank closings by the comptroller and the volun-

tary cases by the subsidiaries. The Official Creditors' Committee of the debtors was allowed to intervene to assert essentially the same grounds as MCorp in support of an injunction.

MCorp is left with five bank subsidiaries and all of its nonbank subsidiaries, two of which are also debtors in bankruptcy. MCorp maintains that twelve of its banks were closed illegally or improvidently. The closed institutions are not under the control of MCorp because they are under FDIC receiverships.

The Federal Reserve Board has initiated administrative actions against MCorp as a bank holding company for violating its regulations that ensure the integrity of the banking system through the requirement that the holding company be a "source of financial strength" to the subsidiary banks. The administrative actions will conflict with MCorp's ability to address a global reorganization in the bankruptcy case.

4. *Standard for Injunctive Relief.*

This proceeding is in the nature of a preliminary declaratory judgment rather than a normal preliminary injunction which maintains some status between principal litigants until the merits of their claims have been heard. This injunction will prospectively assign one authority or another to supervise a restructuring.

Despite the peculiar nature, this injunction meets the regular requirements. *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974).

A. MCorp is likely to prevail on the merits of its legal priority claim. The automatic stay is applied rigorously, and only in exceptional cases is there a departure from protecting the debtor. Where the regulation is inextricably mixed with the restructuring process rather than some ancillary public health or safety question, MCorp ought to succeed with its claim of insulation from the Board by the automatic stay. Even if the regulatory exemption applies, the highly probable result is MCorp's success because of the availability of the anti-interference protection.

B. Enjoining the Board is necessary to prevent imminent and irreparable harm to the Debtor; responding to the Board's proceedings deprives MCorp of resources desperately needed to prepare for its reorganization. If MCorp is to survive, to the benefit of the creditors and the government, it must act quickly, for a lingering Chapter 11 case inevitably becomes a liquidation. Obliging MCorp to respond in multiple forums to multiple agencies, each with its own internal and external priorities, would dissolve the focus MCorp needs to see the route to survival.

C. The risk to MCorp in both probability and magnitude exceeds the possible danger to the Board's interests. The safeguards of the bankruptcy code ensure the protection of the generalized interest of the Board in healthy holding companies. The Board's exposure to liability independent of its regulatory concern is minimal, and it is not jeopardized by this injunction. Its interest can adequately be represented in the bankruptcy proceedings.

D. The issuance of this injunction does not harm the public interest defined either as the general public interest or as the discernible interests of unrepresented third-parties. To the contrary, the public is served by having all proceedings in one forum, especially a forum where the individuals in the affected public can participate.

5. *Issue.*

When a bank holding company seeks reorganization under the bankruptcy code, does the general bankruptcy process supersede the processes of the agencies that regulate banking?

6. *Regulatory Framework.*

A. *Comptroller of the Currency.*

General supervision of national banks, including their creation and closing, is confided to the comptroller of the currency. If, on his examination, the comptroller determines that a bank is insolvent, he places it in receivership. That receiver is the FDIC. 12 U.S.C. § 191.

B. *Federal Deposit Insurance Corporation.*

The FDIC has two roles in banking regulation. First, it acts as a limited insurer of deposits to attract depositors to the banking system and to prevent runs, with their destructive effects. Second, the FDIC acts as a receiver for the estate of a bank that has been closed by the comptroller. 12 U.S.C. § 1811.

C. *Federal Reserve Board.*

The Federal Reserve System is the central bank for the United States, and among its powers are responsibilities for the regulation of banks and bank holding companies. The Board's regulation takes many forms, like its clearinghouse function, furnishing liquidity, margin and capital requirements, open market purchases and sales, and currency issuance.

Under the FISA, if the Board finds that a bank holding company has engaged in an unsafe or unsound practice, the Board has the authority to notify the company of its charges, stating the violations and setting a hearing before the Board. 12 U.S.C. § 1818(b). If the charges are proved, the Board can order the company to stop the derelict practices and to take affirmative steps to prevent future violations.

Temporary orders to desist may also be issued by the Board before proceedings are completed. These orders may be issued without a hearing and are effective immediately.

Because the purpose of vesting the Board with these powers is to assure the soundness of banks that are owned by holding companies, transactions between the parent company and its nonbank subsidiaries may be regulated to prevent losses to the bank subsidiaries.

7. *Classes of Regulation by the Board.*

The Board has claimed four classes of authority over the Debtor and its components. First, the Board is empowered to regulate the banking process, through its clearinghouse function, for example.

Second, the most obvious class of power that the Board has over banks is through its central bank functions. These directly affect the parties here, through reserve and margin requirements for instance, but they are fashioned at a higher level than individual bank operation. These are not involved; the bank subsidiaries of MCorp will continue to abide by the Board's general regulation of banking transactions.

Third, the Board is charged generally with supervision of bank and bank holding company practices that may endanger the integrity of the banks and the system of banks. These vaguely defined powers cover items from the re-

quirement of minimum capital to the prohibition of self-dealing.

Fourth, the Board asserts the authority to direct the activities of the holding company's nonbank subsidiaries in their transactions unrelated to banks or banking including forcing a sale for capital infusion.

8. ***Priority of Regulation.***

Banks cannot file for bankruptcy; they must reorganize or liquidate under the banking laws. Bank holding companies, however, are not prohibited from recourse to bankruptcy, and while they are regulated by banking agencies, they cannot be reorganized or liquidated under the laws for banks. Congress has amended both the banking and the bankruptcy laws several times, never resolving this potential conflict.

The new bankruptcy code was adopted in 1978, long after bank holding companies had been regulated. The holding company act has been frequently amended itself. The dual nature of bank holding companies implicates the interests of the systems both of regulation and of reorganization. The statutes as enacted limit the bank regulators to primacy in dealing with banks.

When a bank holding company is a debtor in possession, the conflict between the court's restructuring of the corporation and the Board's regulating can be resolved by allowing the Board to participate in the court proceeding. Preclusion by the bankruptcy forum would not cover the Board's clearinghouse or monetary functions, but it would restrict the Board's supervision of MCorp's asset allocation, intra-group transactions, and third-party contracts. This would give the Debtor the reprieve needed to retrieve its vitality.

Allowing the Board's proceedings to continue in a separate forum poses several problems. Parallel proceedings are

both confusing and inefficient. The potential for a successful reorganization would be jeopardized. The bankruptcy code is designed to be a comprehensive plan to rehabilitate the debtor to the exclusion of actions impairing reorganization.

Without minimizing the importance of the Board's administrative power over bank holding companies, the need for the court's power over the entirety of the debtor's estate takes precedence. This preemption is supported by policy and law.

Financial Institutions Supervisory Act, 12 U.S.C. § 1818(i), says:

> [N]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

Similar jurisdictional limitations have been overridden through control of the debtor's estate having been entrusted to the authority of the bankruptcy court. This construction has been employed in cases affecting the Court of Claims and the Tax Court (both administrative rather than judicial); their jurisdictional grants are parallel to the Board's and distinct from the judicial power through the bankruptcy code. *See In re Casey Corp.*, 46 B.R. 473 (Bankr.S.D.Ind.1985); *Bostwick v. United States*, 521 F.2d 741 (8th Cir.1975).

The *in rem* proceedings in admiralty, which are particular liquidation actions, yield to the bankruptcy code's plan for general liquidation. This is true even though maritime jurisdiction is directly a judicial power of international significance. *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025 (5th Cir.1985). The grant of jurisdiction over the debtor's estate for the restricted purpose of facilitating

the reorganization of the debtor supersedes other jurisdictional limits. 28 U.S.C. § 1334(d).

9. ***Regulatory Exception to the Stay.***

Even if the principal power over the debtor's estate is in the bankruptcy court, agencies whose mandate includes matters of "police or regulatory power" are not barred by the filing of a petition from pursuing the debtor. 11 U.S.C. § 362(b)(4). Although very few imaginable acts of a governmental unit could not plausibly be claimed to be within that category, congress did not act to exempt all governmental actions from the automatic stay, for the phrase "police and regulatory power" is a peculiar way to say "all."

A. There are two tests usually articulated in deciding whether the stay applies to a governmental action. Although neither of these dichotomies is particularly applicable with precision, they both do recognize that there are automatically stayed governmental activities.

(1) The first divides governmental actions into two categories: pecuniary interest of the state in the debtor's estate or public policy affecting safety and health.

(2) The second divides governmental actions into two slightly different categories: those that adjudicate private rights and those that effectuate public policy. *See N.L.R.B. v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir.1986).

B. A solution to the definitional problem can be reached on procedural grounds. The principal difference between the automatic stay and the anti-interference injunction is the burden on the participants. For ordinary acts against the debtor's property, the stay has minimal risk to those who are blocked or the public. Because the automatic stay of private acts against the debtor's estate covers the majority of the debtor's relations, it has enough relief to allow reorganization. For governmental acts (as well as third-parties) to be blocked, however, the debtor must identify and move against them specifically through an injunction. The effect of this reading would produce a clear and reasonable approach, but it would still be an alteration of the plain text of the statute.

C. One solution to the lack of precision in the clause that allows some escape by governments from the stay is to attempt to classify governmental actions between those that are of immediate, actual concern to the health of the general public and those that are assists to private parties, asset allocations, and property acquisitions for its own account, as they are at cross purposes with the federal reorganization powers.

The Board's interest in protecting the public from "unsafe" banking practices may be important, but it does not rise to the level of injury or immediacy of aircraft certification, adulterated foods, or transportation of diseased livestock. 12 CFR 225, Reg. Y. In a case involving the Environmental Protection Agency, a court of appeals has said that the scope of the exemption from the stay is not limited to matters of imminent physical peril; however, the case dealt with a landfill without several safeguards, including a prevention of polluted runoff, so the comment was an observation, not a holding. *Matter Commonwealth Oil Refining Co., Inc.*, 805 F.2d 1175 (5th Cir.1986) *cert. denied sub nom. Commonwealth Oil and Refining Co. v.*

E.P.A., 483 U.S. 1005, 107 S.Ct. 3228, 97 L.Ed.2d 734 (1987). Notably, the legislative history of the code reveals that bankruptcy courts had been enforcing the automatic stay against state pollution abatement efforts. *See* HR Rep. No. 95-595, 95th Cong., 1st Sess., 174-5 (Bankruptcy Reform Act of 1978), U.S. Code Cong. & Admin.News 1978, pp. 5787, 6134, 6135.

One court has held that access to assets that are necessary to the business's future vitality are exempt regulatory matters, and not even property of the debtor's estate since the assets were useful only through further regulation. *In re Braniff Airways,* 700 F.2d 935 (5th Cir.1983) (landing slots necessary for reorganization were not subject to bankruptcy court orders over FAA).

On the other hand, there are cases restricting the exemption from the stay to matters directly affecting the public safety, which should not be interrupted pending a hearing to lift the stay. Others have held that some parallel proceedings, like competing license applications, that might require some distraction to the debtor's reorganization effort are not stayed through the exemption even though they do not involve palpable health hazards. *See Jordan v. Randolph Mills, Inc.*, 716 F.2d 1053-(4th Cir.1983); *In re D.H. Overmyer Telecasting Co., Inc.*, 35 B.R. 400 (Bankr.N.D.Ohio 1983).

10. ***Governmental Actions Not Excepted from the Stay.***

Ignoring the distinction between "all" and "police-regulatory" is easy and wrong; by the plain terms of the statute there are governmental actions that are not exempted from the stay. To determine whether a governmental function is among those that should be exempt, the court must evaluate the function of the regulation, the probability of direct public harm, the opportunity for the public interest to be

effectively represented in the bankruptcy proceeding, and the relation between the regulation and the financial, legal, and structural requirements for an effective reorganization. *See In re King Memorial Hospital, Inc.*, 4 B.R. 704 (Bankr.S.D.Fla.1980); *In re Joe DeLisi Fruit Co.*, 11 B.R. 694 (Bankr.D.Minn.1981).

Both the Board's generalized, diffuse interest in the holding comany as well as the duplicative, distracting hearings militate for its being not exempt from the stay.

11. ***Reorganization by Subterfuge.***

MCorp argues that the current state of regulatory orders issuing from the Board is effectively an attempt by the Board to control the estate of the Debtor for the purpose of dictating MCorp's future structure. While this appears plausible, it is unnecessary to address it in detail because the stay applies to most of the regulation and because the Board is subject to the anti-interference prohibition. 11 U.S.C. § 105.

The bankruptcy court can scrutinize the potential for undisclosed motivations when the Board presents a motion to lift the stay.

12. ***Anti-Interference Authority.***

Whatever the role of the automatic stay, the bankruptcy code authorizes an injunction against third parties from conducting otherwise fully legitimate actions when those actions would impede the viability of the debtor's reorganization. The Board claims an exemption from the anti-interference power parallel to the regulatory exemption from the automatic stay. Virtually any company is subject to a variety of regulatory agencies, and no reorganization would be possible without requiring the federal, state, and local authorities to submit their claims through the bank-

ruptcy process. Securities issued as a consequence of a bankruptcy supervised reorganization are expressly exempt from the registration requirements of the Securities and Exchange Commission. 11 U.S.C. § 1145.

The court shares the Board's concern that the laudable but limited purposes of bankruptcy not be perverted into an escape from regulation. The bankruptcy process includes a vigilant, fully empowered judge who will prevent individual or collusive efforts to evade the Debtor's responsibilities to the public.

The Board's interest in MCorp, as distinct from the comptroller or FDIC's interest in the banks, is secondary and diffuse. The overlapping authority between bank regulators and bankruptcy courts is resolved in favor of the court. As an example, when responding to a receivership imposed by a district court under the Securities and Exchange Commission's authority, it has been said that "To the extent that the exercise of this jurisdiction threatens the assets of the debtor's estate, the bankruptcy court may issue a stay of those proceedings." *Securities & Exch. Comm'n v. First Fin. Group of Texas,* 645 F.2d 429, 440 (5th Cir.1981).

13. *Conclusion.*

While the operation of the banking system under the guidance of the Board is an important interest, congress has also recognized the importance of allowing debtors to restructure so that they may make a contribution to the economic vitality of the country. Under the circumstances of a bank holding company with nonbank subsidiaries, accommodation of the two national interests in bankruptcy and banking requires that the bankruptcy court have primacy over the non-operations aspects of the debtor and that the Board, after participating, abide by the capital

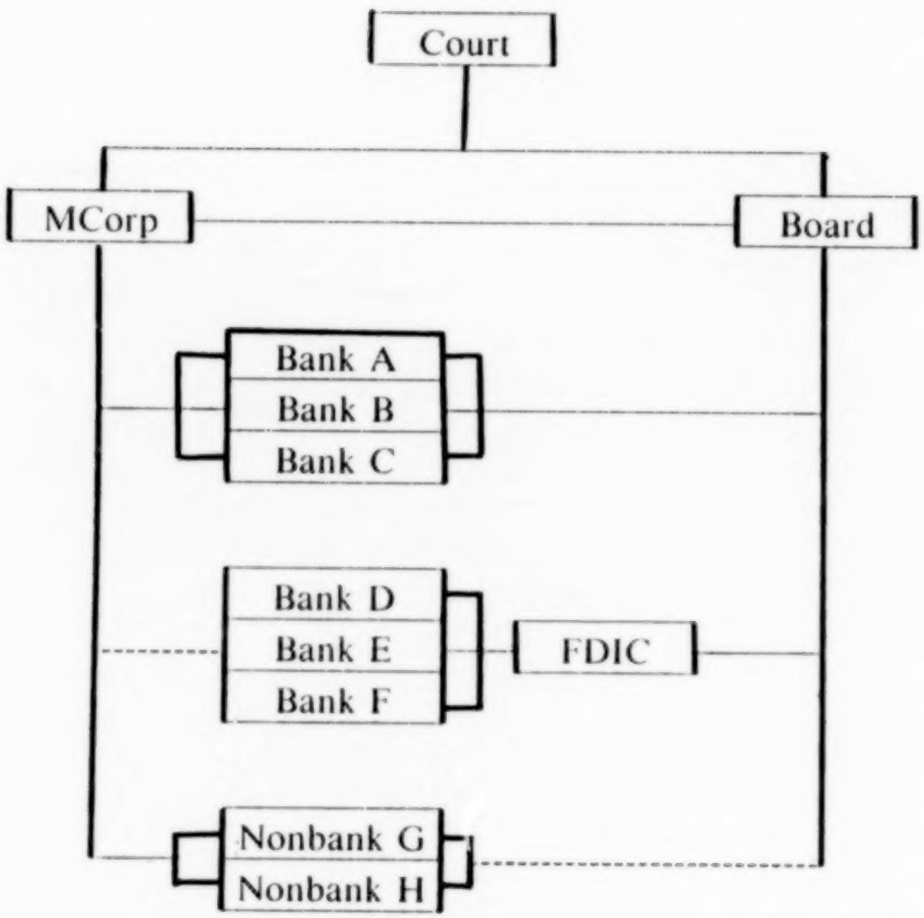
allocation and structural aspects of the debtor as determined in the bankruptcy rather than conducting its independent actions.

The court is mindful that a debtor that follows MCorp's precedent may attempt to abuse the opportunity furnished by the bankruptcy code, but the principle here is clear, and it must be applied with care, even here. The court is also mindful of who was paid to prevent the bank practices that resulted in the collapse of the system in the Southwest. Neither side has an occasion for self-righteousness.

The Board will be enjoined to allow the claims in its pending charges to abate, except through the bankruptcy court.

Signed on June 19, 1989, at Houston, Texas, correcting case numbers and descriptions in the "Background of the Controversy" section of the opinion of June 9, 1989.

APPENDIX A.



A-C represent remaining subsidiary banks.
D-F represent subsidiary banks declared insolvent.
G-H represent nonbank subsidiaries.

PRELIMINARY INJUNCTION AGAINST THE FEDERAL RESERVE SYSTEM'S PROCEEDING ADMINISTRATIVELY AGAINST MCORP

1. *Parties.*

A. The parties plaintiff are:

(1) MCorp, a bank holding company;

(2) MCorp Financial, Inc., a non-bank subsidiary of MCorp; and

(3) MCorp Management, a non-bank subsidiary of MCorp.

(4) Each of the plaintiffs are debtors in possession (MCorp collectively).

B. The Official Creditors Committee formed under the bankruptcy statutes has been allowed to intervene.

C. The party defendant is the Board of Governors of the Federal Reserve System of the United States (Board).

2. *Related Proceedings.* This civil action was an adversary proceeding in the consolidated bankruptcy case to reorganize MCorp. and the reference by the district court to the bankruptcy court was withdrawn. (Adversary Number 89-0298.) The other actions are:

A. An involuntary petition was filed in the Southern District of New York against MCorp, and it was transferred here to pend under Case Number 89-02848-H2-11.

B. A voluntary petition was filed in the Southern District of Texas by MCorp Management under Case Number 89-02324-H5-11.

C. A voluntary petition was filed in the Southern District of Texas by MCorp Financial, Inc., under Case Number 89-02312-H3-11.

D. The three bankruptcy actions have been consolidated under the earliest case number for joint administration.

3. *Reasons.* The court finds these to be reasons to grant injunctive relief:

A. The allocation of power to supervise bank holding companies conflicts when the corporation has sought protection under the bankruptcy statutes, and the conflicts can be minimized only through the intervention of the court.

B. The waste and confusion attendant upon parallel bankruptcy and administrative proceedings would defeat the legislative expectation of both sets of statutes, harm irreparably the estates of the bankrupts and their creditors (including the various governmental claims), escalate transaction costs by duplication and conflict, and protect no public interest or governmental function not fully addressable in the bankruptcy proceeding.

C. Prevalence on the merits in this case appears to be reduced to a correct interpretation of which public forum has precedence when a bank holding company has subsidiaries that include non-banks; however, MCorp is likely to prevail on its claim that the executive's administrative power over bank holding companies is preempted by the bankruptcy power which congress has confided to the judiciary.

D. Neither an interest of the public nor an interest of a group of nonparties will be harmed by this injunctive solution to the regulatory conflict.

4. *Restraint.* It is decreed that:

A. The Board is preliminarily enjoined from prosecuting:

(1) Notice of Charges dated October 19, 1988;

(2) Amended Notice of Charges dated October 26, 1988;

(2) Notice of Charges dated March 30, 1989, and;

(4) Second Amended Notice of Charges dated May 24, 1989, issued by the Board to MCorp, and

B. The Board is preliminarily enjoined from enforcing the temporary desist orders issued by the Board to MCorp. dated October 19, 1988, and October 26, 1988.

C. The Board may continue its general execution, supervisory, and examination duties of the operations of MCorp and its bank subsidiaries and may continue its central bank duties as they affect MCorp in common with all other institutions.

D. The Board is enjoined from using its authority over bank holding companies or banks to attempt to effect, directly or indirectly, a reorganizaton of the MCorp group or its components or to interfere, except through participation in the bankruptcy proceedings, with the restructuring being developed in the bankruptcy proceeding.

E. The restraint of this order is effective against the governors, the Federal Reserve System, its employees, its agents, and those acting in concert with them; however, the restraint does not apply to parallel agencies of the government like the Comptroller of the Currency or the Federal Deposit Insurance Corporation as they may independently pursue their regulatory mandates.

5. *Prospective Board Actions.*

A. The Board shall present proposed new administrative proceedings by it against MCorp or the pro-

posed issuance of new notices of charges or new temporary desist orders to MCorp.

B. If the parties cannot agree that the subject of the new proceeding is within the category of regulation exempted from this injunction, then the proposed action shall be presented to this court to determine whether it is an operational issue for the Board or an asset-structural issue for the bankruptcy court.

6. *Further Proceedings.*

A. Under emergency scheduling, the parties may seek modification of this order after notice to the parties.

B. The trial will not be set until the bankruptcy court has had a reasonable opportunity to address the issues raised by MCorp having subsidiaries banks and non-banks.

C. A status conference is set for:

August 15, 1989
10:00 a.m. Tuesday.

Signed on June 19, 1989, at Houston, Texas, correcting case numbers and descriptions in the "Related Proceedings" section of the judgment rendered on June 2, 1989, and signed June 3, 1989.

APPENDIX D

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(a) of the Bank Holding Company Act of 1956, 12 U.S.C. 1842(a):

Prior approval of Board as necessary; exceptions; disposition, time extension; subsequent approval or disposition upon disapproval

It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 1841(b) of this title and except as provided in paragraphs (2) and (3) of section 1841(g) of this title, or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after May 9, 1956, in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares

prior to such acquisition. The Board is authorized upon application by a bank to extend, from time to time for not more than one year at a time, the two-year period referred to above for disposing of any shares acquired by a bank in the regular course of securing or collecting a debt previously contracted in good faith, if, in the Board's judgment, such an extension would not be detrimental to the public interest, but no such extension shall in the aggregate exceed three years. For the purpose of the preceding sentence, bank shares acquired after December 31, 1970, shall not be deemed to have been acquired in good faith in a fiduciary capacity if the acquiring bank or company has sole discretionary authority to exercise voting rights with respect thereto, but in such instances acquisitions may be made without prior approval of the Board if the Board, upon application filed within ninety days after the shares are acquired, approves retention or, if retention is disapproved, the acquiring bank disposes of the shares or its sole discretionary voting rights within two years after issuance of the order of disapproval.

Section 3(c) of the Bank Holding Company Act of 1956, 12 U.S.C. 1842(c):

Factors governing determination of application for approval

The Board shall not approve—

(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize of banking in any part of the United States, or

(2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint [of] trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in

the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served. Notwithstanding any other provision of law, the Board shall not follow any practice or policy in the consideration of the application for the formation of a one-bank holding company if following such practice or policy would result in the rejection of such application solely because the transaction to form such one-bank holding company involves a bank stock loan which is for a period of not more than twenty-five years. The previous sentence shall not be construed to prohibit the Board from rejecting any application solely because the other financial arrangements are considered unsatisfactory. The Board shall consider transactions involving bank stock loans for the formation of a one-bank holding company having a maturity of twelve years or more on a case by case basis and no such transaction shall be approved if the Board believes the safety or soundness of the bank may be jeopardized.

Section 5 of the Bank Holding Company Act of 1956, 12 U.S.C. 1844:

Administration

(a) Registration of bank holding company

Within one hundred and eighty days after May 9, 1956, or within one hundred and eighty days after becoming a bank holding company, whichever is later, each bank holding company shall register with the Board on forms prescribed by the Board, which shall include such information with respect to the financial condition and operations, management, and intercompany relationships of the bank holding company and its subsidiaries, and related

matters, as the Board may deem necessary or appropriate to carry out the purposes of this chapter. The Board may, in its discretion, extend the time within which a bank holding company shall register and file the requisite information.

(b) Regulations and orders

The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof.

(c) Reports required by Board; examinations; cost of examination

The Board from time to time may require reports under oath to keep it informed as to whether the provisions of this chapter and such regulations and orders issued thereunder have been complied with; and the Board may make examinations of each bank holding company and each subsidiary thereof, the cost of which shall be assessed against, and paid by, such holding company. The Board shall, as far as possible, use the report of examinations made by the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the appropriate State bank supervisory authority for the purposes of this section.

(d) Reports to the Congress; recommendations

Before the expiration of two years following May 9, 1956, and each year thereafter in the Board's annual report to the Congress, the Board shall report to the Congress the results of the administration of this chapter, stating what, if any, substantial difficulties have been encountered in carrying out the purposes of this chapter, and any recommendations as to changes in the law which in the opinion of the Board would be desirable.

(e) Termination of activities or ownership or control of nonbank subsidiaries constituting serious risk

(1) Notwithstanding any other provision of this chapter, the Board may, whenever it has reasonable cause to believe that the continuation by a bank holding company of any activity or of ownership or control of any of its nonbank subsidiaries other than a nonbank subsidiary of a bank, constitutes a serious risk to the financial safety, soundness, or stability of a bank holding company subsidiary bank and is inconsistent with sound banking principles or with the purposes of this chapter or with the Financial Institutions Supervisory Act of 1966, order the bank holding company or any such nonbank subsidiaries, after due notice and opportunity for hearing, and after considering the views of the bank's primary supervisor, which shall be the Comptroller of the Currency in the case of a national bank or the Federal Deposit Insurance Corporation and the appropriate State supervisory authority in the case of an insured nonmember bank, to terminate such activities or to terminate (within one hundred and twenty days or such longer period as the Board may direct in unusual circumstances) its ownership or control of any such subsidiary either by sale or by distribution of the shares of the subsidiary to the shareholders of the bank holding company. Such distribution shall be pro rata with respect to all of the shareholders of the distributing bank holding company, and the holding company shall not make any charge to its shareholders arising out of such a distribution.

(2) The Board may in its discretion apply to the United States district court within the jurisdiction of which the principal office of the holding company is located, for the enforcement of any effective and outstanding order issued under this section, and such court shall have jurisdiction

and power to order and require compliance therewith, but except as provided in section 1848 of this title, no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(f) Powers of Board respecting applications, examinations, or other proceedings

In the course of or in connection with an application, examination, investigation or other proceeding under this chapter, the Board, or any member or designated representative thereof, including any person designated to conduct any hearing under this chapter, shall have the power to administer oaths and affirmations, to take or cause to be taken depositions, and to issue, revoke, quash, or modify subpenas and subpenas duces tecum; and the Board is empowered to make rules and regulations to effectuate the purposes of this subsection. The attendance of witnesses and the production of documents provided for in this subsection may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place where such proceeding is being conducted. Any party to proceedings under this chapter may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district or the United States court in any territory in which such proceeding is being conducted or where the witness resides or carries on business, for the enforcement or any subpena or subpena duces tecum issued pursuant to this subsection, and such courts shall have jurisdiction and power to order and require compliance therewith. Witnesses subpenaed under this subsection shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States.

Any service required under this subsection may be made by registered mail, or in such other manner reasonably calculated to give actual notice as the Board may by regulation or otherwise provide. Any court having jurisdiction of any proceeding instituted under this subsection may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in such person's power so to do, in obedience to the subpena of the Board, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year or both.

The Financial Institutions Supervisory Act, 12 U.S.C. 1818, provides in pertinent part:

Termination of status as insured bank

(a) Notice by bank of intention; citation of bank for unsound practices or violations; hearings; judicial review

Any insured bank (except a national member bank, a foreign bank having an insured branch which is a Federal branch, a foreign bank having an insured branch which is required to be insured under section 3104(a) or (b) of this title, or State member bank) may, upon not less than ninety days' written notice to the Corporation, terminate its status as an insured bank. Whenever the Board of Directors shall find that an insured bank or its directors or trustees have engaged or are engaging in unsafe or unsound practices in conducting the business of such bank, or is in an unsafe or unsound condition to continue operations as an insured bank, or violated an applicable law, rule, regulation or order, or any condition imposed in writing by the Corporation in connection with the granting of any application

or other request by the bank, or any written agreement entered into with the Corporation the Board of Directors shall first give to the Comptroller of the Currency in the case of a national bank or a district bank, to the Federal Home Loan Bank Board in the case of an insured Federal savings bank, to the authority having supervision of the bank in the case of a State bank, and to the Board of Governors of the Federal Reserve System in the case of a State member bank, a statement with respect to such practices or violations for the purpose of securing the correction thereof and shall give a copy thereof to the bank. Unless such correction shall be made within one hundred and twenty days, or such shorter period not less than twenty days fixed by the Corporation in any case where the Board of Directors in its discretion has determined that the insurance risk of the Corporation is unduly jeopardized, or fixed by the Comptroller of the Currency in the case of a national bank, or the Federal Home Loan Bank Board in the case of an insured Federal savings bank, or the State authority in the case of a State bank, or Board of Governors of the Federal Reserve System in the case of a State member bank as the case may be, the Board of Directors, if it shall determine to proceed further, shall give to the bank not less than thirty days' written notice of intention to terminate the status of the bank as an insured bank, and shall fix a time and place for a hearing before the Board of Directors or before a person designated by it to conduct such hearing, at which evidence may be produced, and upon such evidence the Board of Directors shall make written findings which shall be conclusive. If the Board of Directors shall find that any unsafe or unsound practice or condition or violation specified in such statement has been established and has not been corrected within the time above prescribed in which to make such corrections, the Board of Directors may order that the insured status of the bank be terminated on a date subsequent to such finding

and to the expiration of the time specified in such notice of intention. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank and termination of such status thereupon may be ordered. Any insured bank whose insured status has been terminated by order of the Board of Directors under this subsection shall have the right of judicial review of such order only to the same extent as provided for the review of orders under subsection (h) of this section. The Corporation may publish notice of such termination and the bank shall give notice of such termination to each of its depositors at his last address of record on the books of the bank, in such manner and at such time as the Board of Directors may find to be necessary and may order for the protection of depositors. After the termination of the insured status of any bank under the provisions of this subsection, the insured deposits of each depositor in the bank on the date of such termination, less all subsequent withdrawals from any deposits of two years to be insured, and the bank shall continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such bank shall, in all other respects, be subject to the duties and obligations of an insured bank for the period of two years from the date of such termination, and in the event that such bank shall be closed on account of inability to meet the demands of its depositors within such period of two years, the Corporation shall have the same powers and rights with respect to such bank as in case of an insured bank.

(b) Cease-and-desist proceedings

(1) If, in the opinion of the appropriate Federal banking agency, any insured bank, bank which has insured deposits, or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such a bank is engaging or has engaged, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to engage, in an unsafe or unsound practice in conducting the business of such bank, or is violating or has violated, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank or any written agreement entered into with the agency, the agency may issue and serve upon the bank or such director, officer, employee, agent, or other person a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of

the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of such bank to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the bank or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections (c) through (f) and (h) through (n) of this section shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956 [12 U.S.C. 1841 et seq.], and to any organization organized and operated under section 25(a) of the Federal Reserve Act [12 U.S.C. 611 et seq.] or operating under section 25 of the Federal Reserve Act [12 U.S.C. 601 et seq.], in the same manner as they apply to a State member insured bank. Nothing in this subsection or in subsection (c) of this section shall authorize any Federal banking agency,

other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank)

(4) This subsection and subsections (c), (d), (h), (i), (k), (l), (m), and (n) of this section shall apply to any foreign bank or company to which subsection (a) of section 3106 of this title applies and to any subsidiary (other than a bank) of any such foreign bank or company in the same manner as they apply to a bank holding company and any subsidiary thereof (other than a bank) under subparagraph (3) of this subsection. For the purposes of this paragraph, the term "subsidiary" shall have the meaning assigned to it in section 2 of the Bank Holding Company Act of 1956 [12 U.S.C. 1841].

(5) This section shall apply, in the same manner as it applies to any insured bank for which the appropriate Federal banking agency is the Comptroller of the Currency, to any national banking association chartered by the Comptroller of the Currency, including an uninsured association.

(c) Temporary cease-and-desist orders

(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or substantial dissipation of assets or earnings of the bank, or is likely to seriously weaken the condition of the bank or otherwise seriously prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency

may issue a temporary order requiring the bank or such director, officer, employee, agent, or other person to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order shall become effective upon service upon the bank or such director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the bank or such director, officer, employee, agent, or other person, until the effective date of such order.

(2) Within ten days after the bank concerned or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank has been served with a temporary cease-and-desist order, the bank or such director, officer, employee, agent, or other person may apply to the United States district court for the judicial district in which the home office of the bank is located, or the United States District Court for the District of Columbia, for an injunction * * * setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the bank or such director, officer, employee, agent, or other person under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.

(d) Temporary cease-and-desist orders; enforcement

In the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order issued pursuant to paragraph (1) of subsection (c) of this section, the appropriate Federal banking agency may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the bank is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction.

* * * * *

(h) Hearings and judicial review

(1) Any hearing provided for in this section (other than the hearing provided for in subsection (g)(3) of this section) shall be held in the Federal judicial district or in the territory in which the home office of the bank is located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of title 5. Such hearing shall be private, unless the appropriate Federal banking agency, in its discretion, after fully considering the views of the party afforded the hearing, determines that a public hearing is necessary to protect the public interest. After such hearing, and within ninety days after the appropriate Federal banking agency or Board of Governors of the Federal Reserve System has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection (h). Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in

paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the agency may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to the proceeding, or any person required by an order issued under this section to cease and desist from any of the violations or practices stated therein, may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the bank or the director or officer or other person concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the bank is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency.

(i) Jurisdiction and enforcement; penalty

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the bank is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(2)(i) Any insured bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such bank who violates the terms of any order which has become final and was issued pursuant to subsection (b), (c), or (s) of this section, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: *Provided,* That the agency having authority to impose a civil money penalty may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the appropriate Federal banking agency by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting, a violation.

(ii) In determining the amount of the penalty the appropriate Federal banking agency shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the insured bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may required.

(iii) The insured bank or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of title 5. The agency determination shall be made by final order which may be reviewed only as provided in subparagraph (iv). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(iv) Any insured bank or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the insured bank is located, or the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within twenty days from the service of such order, and simultaneously sending a copy of such notice by registered or certified mail to the appropriate Federal banking agency. The agency shall promptly certify and file in such Court the record upon which the penalty was imposed, as provided in section 2112 of title 28. The findings of the agency shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5.

(v) If any insured bank or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the agency shall refer the matter to

the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action, the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(vi) Each Federal banking agency shall promulgate regulations establishing procedures necessary to implement this paragraph.

(vii) All penalties collected under authority of this section shall be covered into the Treasury of the United States.

* * * * *

(k) Definitions

As used in this section (1) the terms "cease-and-desist order which has become final" and "order which has become final" mean a cease-and-desist order, or an order, issued by the appropriate Federal banking agency with the consent of the bank or the director or officer or other person concerned, or with respect to which no petition for review of the action of the agency has been filed and perfected in a court of appeals as specified in paragraph (2) of subsection (h) of this section, or with respect to which the action of the court in which said petition is so filed is not subject to further review by the Supreme Court of the United States in proceedings provided for in said paragraph, or an order issued under paragraph (1) or (3) of subsection (g) of this section, and (2) the term "violation" includes without limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

Section 902 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, tit. IX, 103 Stat. 450-451 (amending 12 U.S.C. 1818(b) and (c)), provides in pertinent part:

Amendments To Cease And Desist Authority With Respect To Restitution, Restrictions On Specific Activities, Grounds For Issuance Of a Temporary Order, And Incomplete Or Inaccurate Records

(a) Depository Institutions Insured by the FDIC.—

(1) Cease and Desist Authority.—Section 8(b) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)) is amended—

(A) in paragraph (3), by striking out "subsections (c) through (f) and (h) through (n)," and inserting in lieu thereof "subsections (c) through (s) and subsection (u)";

(B) in paragraph (4), by striking out "subsections (c) through (f) and (h) through (n)" and inserting in lieu thereof "subsections (c) through (s) and subsection (u)"; and

(C) by adding at the end thereof the following new paragraphs:

"(6) Affirmative action to correct conditions resulting from violations or practices.—This authority to issue an order under this subsection and subsection (c) which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to—

"(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if—

"(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

"(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

"(B) restrict the growth of the institution;

"(C) dispose of any loan or asset involved;

"(D) rescind agreements or contracts; and

"(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

"(F) take such other action as the banking agency determines to be appropriate.

"(7) Authority to limit activities. – The authority to issue an order under this subsection or subsection (c) includes the authority to place limitations on the activities or functions of an insured depository institution or any institution-affiliated party.

"(8) Expansion of authority to savings and loan affiliates and entities. – Subsections (a) through (s) and subsection (u) shall apply to any savings and loan holding company and to any subsidiary (other than a bank or subsidiary of that bank) of a savings and loan holding company, to any service corporation of a savings association and to any subsidiary of such service corporation, whether wholly or partly owned, in the same manner as such subsections apply to a savings association.".

(2) Temporary cease and desist authority. – Section 8(c) of the Federal Deposit Insurance Act (12 U.S.C. 1818(c)) is amended –

(A) in paragraph (1) –

(i) by striking out "substantial" and inserting in lieu thereof "significant";

(ii) by strking out "seriously" each place such term appears; and

(iii) by inserting after the 1st sentence the following new sentence; "Such order may include any requirement authorized under subsection (b)(6)(B)."; and

(B) by adding at the end thereof the following new paragraph:

"(3) Incomplete or inaccurate records. –

"(A) Temporary order. – If a notice of charges served under subsection (b)(1) specifies, on the basis of particular facts and circumstances, that an insured depository institution's books and records are so incomplete or inaccurate that the appropriate Federal banking agency is unable, through the normal supervisory process, to determine the financial condition of that depository institution or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that depository institution, the agency may issue a temporary order requiring –

"(i) the cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

"(ii) affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under subsection (b)(1).

"(B) Effective period. – Any temporary order issued under subparagraph (A) –

"(i) shall become effective upon service; and

"(ii) unless set aside, limited, or suspended by a court in proceedings under paragraph (2), shall remain in effect and enforceable until the earlier of—

"(I) the completion of the proceeding initiated under subsection (b)(1) in connection with the notice of charges; or

"(II) the date the appropriate Federal banking agency determines, by examination or otherwise, that the insured depository institution's books and records are accurate and reflect the financial condition of the depository institution."

Section 908 of the International Lending Supervision Act of 1983, 12 U.S.C. 3907:

Capital adequacy

(a)(1) Each appropriate Federal banking agency shall cause banking institutions to achieve and maintain adequate capital by establishing minimum levels of capital for such banking institutions and by using such other methods as the appropriate Federal banking agency deems appropriate.

(2) Each appropriate Federal banking agency shall have the authority to establish such minimum level of capital for a banking institution as the appropriate Federal banking agency, in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution.

(b)(1) Failure of a banking institution to maintain capital at or above its minimum level as established pursuant to subsection (a) of this section may be deemed by the appropriate Federal banking agency, in its discretion, to constitute an unsafe and unsound practice within the meaning of section 1818 of this title.

(2)(A) In addition to, or in lieu of, any other action authorized by law, including paragraph (1), the appropriate Federal banking agency may issue a directive to a banking institution that fails to maintain capital at or above its required level as established pursuant to subsection (a) of this section.

(B)(i) Such directive may require the banking institution to submit and adhere to a plan acceptable to the appropriate Federal banking agency describing the means and timing by which the banking institution shall achieve its required capital level.

(ii) Any such directive issued pursuant to this paragraph, including plans submitted pursuant thereto, shall be enforceable under the provisions of section 1818(i) of this title to the same extent as an effective and outstanding order issued pursuant to section 1818(b) of this title which has become final.

(3)(A) Each appropriate Federal banking agency may consider such banking institution's progress in adhering to any plan required under this subsection whenever such banking institution, or an affiliate thereof, or the holding company which controls such banking institution, seeks the requisite approval of such appropriate Federal banking agency for any proposal which would divert earnings, diminish capital, or otherwise impede such banking institution's progress in achieving its minimum capital level.

(B) Such appropriate Federal banking agency may deny such approval where it determines that such proposal would adversely affect the ability of the banking institution to comply with such plan.

(C) The Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury shall encourage governments, central banks, and regulatory authorities of other major banking countries to work

toward maintaining and, where appropriate, strengthening the capital bases of banking institutions involved in international lending.

Section 910 of the International Lending Supervision Act of 1983, 12 U.S.C. 3909:

General Authorities

(a) Rules and regulations

(1) The appropriate Federal banking agencies are authorized to interpret and define the terms used in this chapter, and each appropriate Federal banking agency shall prescribe rules or regulations or issue orders as necessary to effectuate the purposes of this chapter and prevent evasions thereof.

(2) The appropriate Federal banking agency is authorized to apply the provisions of this chapter to any affiliate of an insured bank, but only to affiliates for which it is the appropriate Federal banking agency, in order to promote uniform application of this chapter or to prevent evasions thereof.

(3) For purposes of this section, the term "affiliate" shall have the same meaning as in section 371c of this title, except that the term "member bank" in such section shall be deemed to refer to an "insured bank", as such term is used in section 1813(h) of this title.

* * * * *

(c) Existing authorities

(1) The powers and authorities granted in this chapter shall be supplemental to and shall not be deemed in any manner to derogate from or restrict the authority of each appropriate Federal banking agency under section 1818 of this title or any other law including the authority to require additional capital or reserves.

(2) Any such authority may be used by any appropriate Federal banking agency to ensure compliance by a banking institution with the provisions of this chapter and all rules, regulations, or orders issued pursuant thereto.

* * * * *

Title 12, Code of Federal Regulations, Part 225, provides in pertinent part:

Subpart A – General Provisions

§ 225.1 Authority, purpose, and scope.

(a) *Authority.* This part (Regulation Y) is issued by the Board of Governors of the Federal Reserve System ("Board") under section 5(b) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(b)) ("BHC Act"); sections 8 and 13(a) of the International Banking Act of 1978 (12 U.S.C. 3106 and 3108); section 7(j)(13) of the Federal Deposit Insurance Act, as amended by the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)(13) ("Bank Control Act"); section 8(b) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)); and the International Lending Supervision Act of 1983 (Pub. L. 98-181, Title IX). The BHC codified at 12 U.S.C. 1841, *et seq.*

(b) *Purpose.* The principal purposes of this part are to regulate the acquisition of control of banks by companies and individuals, to define and regulate the nonbanking activities in which bank holding companies and foreign banking organizations with United States operations may engage, and to set forth the procedures for securing approval for such transactions and activities.

(c) *Scope.* (1) Subpart A contains general provisions and definitions of terms used in this regulation.

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§ 225.4 Corporate practices.

(a) *Bank holding company policy and operations.* (1) A bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not con[d]uct its operations in an unsafe or unsound manner.

(2) Whenever the Board believes an activity of a bank holding company or control of a nonbank subsidiary (other than a nonbank subsidiary of a bank constitutes a serious risk to the financial safety, soundness, or stability of a subsidiary bank of the bank holding company and is inconsistent with sound banking principles or the purposes of the BHC Act or the Financial Institutions Supervisory Act of 1966 as amended (12 U.S.C. 1818(b) *et seq.*) the Board may require the bank holding company to terminate the activity or to terminate control of the subsidiary, as provided in section 5(e) of the BHC Act.

* * * * *

§ 225.5 Registration, reports, and inspections.

(a) *Registration of bank holding companies.* Each company shall register within 180 days after becoming a bank holding company by furnishing information in the manner and form prescribed by the Board. A company that receives the Board's prior approval under Subpart B of this regulation to become a bank holding company may complete this registration requirement through submission of its first annual report to the Board as required by paragraph (b) of this section.

(b) *Reports of bank holding companies.* Each bank holding company shall furnish, in the manner and form prescribed by the Board, an annual report of the company's operations for the fiscal year in which it becomes a bank holding company, and for each fiscal year during which it remains a bank holding company. Additional information and reports shall be furnished as the Board may require.

(c) *Examinations and inspections.* The Board may examine or inspect any bank holding company and each of its subsidiaries and prepare a report of their operations and activities. With respect to a foreign banking organization, the Board may also examine any branch or agency of a foreign bank in any state of the United States and may examine or inspect each of the organization's subsidiaries in the United States and prepare reports of their operattions and activities. The Board will rely as far as possible on the reports of examination made by the primary federal or state supervisor of the subsidiary bank of a bank holding company or of the branch or agency of the foreign bank.

§ 225.6 Penalties for violations.

(a) *Criminal and civil penalties.* Section 8 of the BHC Act provides criminal penalties for willful violation, and civil penalties for violation, by any company or individual of the BHC Act or any regulation or order issued under it, or for making a false entry in any book, report, or statement of a bank holding company. Civil money penalty assessments for violations of the BHC Act shall be made in accordance with Subpart B of the Board's Rules of Practice for Hearings (12 CFR Part 263, Subpart B). For any willful violation of the Bank Control Act or any regulation or order issued under it, the Board may assess a civil penalty as provided in 12 U.S.C. 1817(j)(15).

(b) *Cease and desist proceedings.* For any violation of the BHC Act, the Bank Control Act, this regulation, or any order or notice issued thereunder, the Board may institute a cease and desist proceeding in accordance with the Financial Institutions Supervisory Act of 1966, as amended (12 U.S.C. 1818(b) *et seq.*).

U.S. GOVERNMENT PRINTING OFFICE 1990 - 262 061 20197